

# ELECTRIC RESTRUCTURING LEGISLATION

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## HEARINGS

BEFORE THE  
SUBCOMMITTEE ON ENERGY AND POWER  
OF THE

COMMITTEE ON COMMERCE  
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

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JUNE 17, 1999—H.R.1828  
JULY 22, 1999—H.R. 687, 971, 1138, 1587, 2050, and 2363

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## ELECTRIC RESTRUCTURING LEGISLATION

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THURSDAY, JUNE 17, 1999

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON COMMERCE,  
SUBCOMMITTEE ON ENERGY AND POWER,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Joe Barton (chairman) presiding.

Members present: Representatives Barton, Bilirakis, Stearns, Largent, Burr, Whitfield, Rogan, Shimkus, Shadegg, Pickering, Bryant, Ehrlich, Bliley (ex officio), Hall, McCarthy, Sawyer, Markey, Pallone, Gordon, Rush, Wynn, Strickland, and Dingell (ex officio).

Staff present: Joe Kelliher, majority counsel; Cathy VanWay, majority counsel; Donn Salvosa, legislative clerk; and Sue Sheridan, minority counsel.

Mr. BARTON. The subcommittee will come to order.

We want to welcome the Secretary of Energy, the Honorable William Richardson.

Today we will have a hearing on electricity competition, the administration's bill, Comprehensive Electricity Competition Act of 1999. This is our seventh day of hearings on electricity restructuring. The question before the Congress is whether retail markets should be opened, how best to open them.

Today we see a very tangible sign of momentum as we hear from the Secretary of Energy, Bill Richardson, about the Clinton Administration's plan for a comprehensive electricity competition restructuring bill. But before we start to discuss the bill, I have some good news. The Texas legislature recently passed a restructuring bill and I talked to George W. Bush yesterday on the telephone, that he plans to sign that bill into law tomorrow in Austin, Texas. I am very pleased that the Texas legislature voted so overwhelmingly to give Texas consumers a choice in their electricity supplier. When Governor Bush signs the bill tomorrow, it will be a banner day for Texas and a major step in promoting choice for electricity consumers across the United States.

Here in Washington, the action which just happened in Texas should be helpful, as myself and Ralph Hall, the ranking member, begin to craft a comprehensive consensus bill for the subcommittee to consider in the near future. The bill is supported by a broad coalition. The coalition will consist of business groups, labor unions, utilities, environmentalists and many other groups. We hope that it will show at the Federal level we can do the same things that

Texas and other States have done in creating consensus at the State level.

On April 15, 1999 the Clinton Administration issued its comprehensive electricity competition plan. The plan addresses retail competition, consumer protection, transmission system reliability, promotion of public benefits, and clarification of Federal and State authority. It also examines what the scope of Federal legislation should be with respect to reliability in transmission.

Many of us on the subcommittee had the pleasure of meeting with Secretary Richardson several weeks ago in the first meeting of our Tuesday working group which is being co-chaired by Congressman Pickering and Congressman Sawyer. At that time we were very encouraged by the administration's willingness to work together on the issue before us today. Myself and others on the subcommittee and at the staff level have had a chance to study the administration's bill closer since it was introduced. I am heartened to see that we agree on many of the same goals, although in some cases perhaps there will be some disagreement about the means of reaching those goals, especially with respect to the Renewable Portfolio Standard and the Public Benefits Fund; but there are many more issues of consensus than not, including the Federal and State jurisdiction issue, the reliability standard issue, and PUHCA and PURPA repeal, among others.

Utility competition benefits all consumers and electric utility restructuring should save American consumers up to \$20 billion annually. It is also noteworthy that billions of dollars in savings should realize for Federal spending. Since the U.S. Government is one of the largest consumers of electricity, it would stand to reason that the Federal Government would realize enormous savings from competitive electricity markets.

In 1997, the Federal Government used 53.6 billion kilowatt hours, 55 percent of which was used by the Department of Defense. At this rate for each 1 cent per kilowatt hour saved through competition, the government saves half a billion dollars. In fact, the GAO has estimated that Federal spending on electricity could decrease by as much as \$8 dollars over several years if it purchased its electricity competitively. That is a savings that even those of us in Washington can appreciate.

I look forward to hearing from Secretary Richardson this morning on how the administration hopes to work with the Congress to proceed on a comprehensive bipartisan electricity restructuring bill to allow consumers in the United States to realize these savings.

Mr. Secretary, we welcome you.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, SUBCOMMITTEE ON ENERGY AND POWER

Today we gather for our seventh day of hearings on electricity restructuring. The question before Congress has shifted from "whether" retail markets should be opened to "how" best to open them. Today we see a very tangible sign of momentum as we hear from Secretary of Energy Bill Richardson about the Administration's plans for a comprehensive electricity restructuring bill.

But before we start to discuss the Administration's bill, I have some good news to report. The Texas legislature has passed a restructuring bill and I have it on good authority that Governor George W. Bush will sign that legislation into law tomorrow.

I am very pleased that the Texas legislature voted so overwhelmingly to give Texas consumers a choice in their electricity supplier. When Governor Bush signs the bill tomorrow it will be a banner day for Texas and a major step in promoting choice for electricity consumers across the United States.

Here in Washington, this Texas action will be very helpful for me and Ranking Member Ralph Hall in working to craft a comprehensive consensus bill in the Subcommittee. The bill is supported by a broad coalition. This coalition consists of business groups, labor unions, utilities and environmentalists, and has shown us at the Federal level that broad consensus is possible.

Now back at the Federal level, on April 15, 1999, the Clinton Administration issued its Comprehensive Electricity Competition Plan. This plan addresses retail competition, consumer protection, transmission system reliability, promotion of public benefits, and clarification of federal and state authority and examines what the scope of Federal legislation should be with respect to reliability and transmission.

Many of us on the subcommittee had the pleasure of meeting with Secretary Richardson several weeks ago in the inaugural gathering of our Tuesday afternoon meetings co-hosted by Congressman Pickering and Congressman Sawyer. At that time we were encouraged by the Administration's willingness to work together on this critical issue. Now that I have had a chance to study the Administration's bill closer, I am heartened to see that we agree on many of the same goals, although in some cases we disagree on the means of getting there, especially with respect to a renewable portfolio standard and a public benefits fund. But there are more issues of consensus than not, including Federal/State jurisdiction, reliability standards, PUHCA and PURPA repeal, among others.

Utility competition benefits all consumers and electric utility restructuring saves American consumers \$20 billion annually. Also noteworthy is the billions of dollars in savings for Federal spending. As the largest consumer of electricity, the Federal Government stands to realize enormous savings from competitive electricity markets. In 1997, the Federal government used 53.6 billion kilowatt hours, 55% of which was used by the Department of Defense. At this rate, for each \$.01 per kilowatt hour saved through competition, the government saves half a billion dollars. In fact, the Government Accounting Office has estimated that federal spending on electricity would decrease by as much as \$8 billion over several years, if it purchased that electricity competitively.

I look forward to hearing from Secretary Richardson how the Administration hopes to proceed on electricity restructuring to allow consumers to realize this substantial savings.

Mr. BARTON. Does the gentleman from New Jersey wish to give an opening statement?

Mr. PALLONE. Yes.

Mr. BARTON. The gentleman is recognized.

Mr. PALLONE. Thank you, Mr. Chairman, and I also want to welcome Secretary Richardson before our subcommittee once again. I wanted to start by commending the administration for substantially improving its restructuring bill since last year and, just by example, I noticed improvements in the Renewable Portfolio Standard and inclusion of incentives for combined heat and power systems and distributed power technologies.

I also would applaud the inclusion of a Public Systems Benefits Fund. Further, the bill includes stronger liability language, and while the aggregation provision may leave some room for improvement, it certainly is an important component of any comprehensive restructuring bill and one which is important to protect consumers, municipalities and cooperatives in all States.

In addition, I am glad that the administration has included emissions trading in its bill. However, the bill does not go far enough, in my opinion, to protect the environment. The administration's cap and trade program only applies to NO<sub>x</sub> emissions.

Shortly I will be reintroducing a bill that includes environmental and consumer protection provisions, the heart of which is a multi-pollutant emissions trading program. Addressing NO<sub>x</sub> emissions

alone I don't think will sufficiently reduce greenhouse gas emissions. My bill will include trading for NO<sub>x</sub>, sulfate particulate matter, and carbon dioxide, and will address mercury emissions, as well.

According to a study by the Alliance to Save Energy, the Union of Concerned Scientists and others, "the U.S. electric sector alone is responsible for about 8 percent of total global carbon dioxide emissions," and we must do our part to reduce these emissions. In addition, if utilities act to reduce NO<sub>x</sub> emissions now, and then have to retrofit to reduce other pollutants later, they will experience exorbitant costs. So, many utilities are supportive of the approach taken in my bill to simultaneously address multiple pollutants.

Further, I think it makes practical sense to include all power plants—old and new—in a trading program, as we restructure the electric utility sector to level the playing field. Otherwise, consumers would have an incentive to purchase cheaper or dirtier power, and trading is the most cost-effective way for utilities to achieve emissions reductions.

I look forward to hearing Secretary Richardson's perspectives on these and other provisions.

Thank you, Mr. Chairman, for holding this important hearing.

Mr. BARTON. Thank you, Congressman Pallone.

The gentleman from Kentucky, Mr. Whitfield, is recognized for an opening statement.

Mr. WHITFIELD. Thank you, Mr. Chairman. All of us are anxious for this 7th hearing this year on this important subject, and we are particularly pleased that Secretary Richardson is with us today. He has a wide breadth of experience in a lot of different areas and we welcome his testimony.

I am focused on Section 701 of the administration's bill, the NO<sub>x</sub> cap and trade provision. When this legislation started out, all of us were focused on a public policy discussion of deregulation of the electrical industry, but as we explore these bills, we find more and more environmental provisions in there. All of us are committed to the environment, but we want to make sure we have a balanced approach that is based on sound science and that is one of the provisions that I particularly want to look this morning. I look forward to the Secretary's testimony and I yield back the balance of my time.

Mr. BARTON. We thank you. The gentleman from Tennessee, Mr. Gordon, is recognized for an opening statement.

Mr. GORDON. Thank you, Mr. Chairman. I just want to welcome the Secretary back and say that in my memory I can't think of any member of the Cabinet who has inherited more long-festered, high-profile issues than you, Mr. Secretary. To your credit, you have stepped up to the plate, time and time again, to put a good starting point with the administration and I hope that some of these issues which have lingered can now move forward and I appreciate your initiative.

Mr. BARTON. Does the gentleman yield back the balance of his time?

Mr. GORDON. I yield back the balance of my time.

Mr. BARTON. Does the gentleman from California, Mr. Rogan, wish to make an opening statement?

Mr. ROGAN. No opening statement. I look forward to the testimony. Thank you, Mr. Chairman.

Mr. BARTON. And we recognize the gentleman from Florida, Mr. Bilirakis for an opening statement?

Mr. BILIRAKIS. Thank you, Mr. Chairman. I have no opening statement, and I thank you for this hearing. It is always good to see Secretary Richardson who was an awfully good colleague when he was with us here, and I trust will remain one. It is good to see you, Bill.

Mr. BARTON. Does the gentleman from Michigan, Mr. Dingell, wish to be recognized for an opening statement?

Mr. DINGELL. Thank you, Mr. Chairman. I ask unanimous consent that my full statement be inserted into the word.

Mr. BARTON. Without objection, so ordered.

Mr. DINGELL. First, welcome back to the committee, Bill.

Second of all, I believe there are some questions that need to be explored with regard to the administration's bill.

First, how will these proposals affect the States? More than 20 States have enacted retail competition plans in one form or another. Is it necessary for the Congress to micromanage these? What burdens would the administration's bill impose on the States and which State prerogatives would be foreclosed? Does the bill transfer to State utility commissions, authority normally exercised by legislatures of the States? If so, is this good? What kinds of proceedings would States have to conduct?

How much would they cost? What would be the result with regard to established policies of the State, including taxation? Which States have already considered competition and would they have to hold extensive new proceedings to conform with the bill's opt-out requirement?

Second, are we talking about deregulation or are we talking about more regulation? The administration's bill would confer broad new authorities on FERC. FERC has a difficult and important job to perform in seeing the electric utility industries are able to function properly during a period of rapid change. Many of these authorities are new. Are they within the capability of FERC? Will their establishment require new authorities being given to FERC?

Congress gave FERC substantial new authority in the Energy Policy Act of 1992, and since then the Commission has issued a number of important transmission orders. Some of these are still under review of the courts. Only last month FERC issued a major proposed rule on regional transmission organizations. In the midst of this rapid change it is imperative that the committee understand the extent and the status of FERC's current authority before deciding whether to amend the power act again.

Third and last, what other policies are covered under the utility restructuring umbrella? The administration bill includes a number of noteworthy miscellaneous provisions that may or may not be related to the core issues in the electric restructuring bill. The legislation would promote a number of social and environmental policies with somewhat tenuous connection to the central debate, including a renewable energy portfolio that recognizes some but not all re-



newable resources. Why are we excluding some and including others?

The NO<sub>x</sub> trading program to help EPA carry out an initiative has been struck down by the courts. How will this work and why is it there? Have we considered this in connection with air pollution problems?

The next item is a public benefits program to provide matching grants to the States which is apparently intended to cushion the impact of retail competition. This is very interesting because it is a brand new Federal fund which is going to have to be funded by consumers. It appears to be susceptible to the same kind of raids as the Nuclear Waste Fund which has been a play thing for the budgeteers and for the appropriations people.

While these matters may have merits, I want to know how they are going to work and why they are there and I want to know what they are going to do and whether they are in the public interest. I know, Mr. Richardson, my old and cherished friend, is going to help us understand all of these questions. Welcome, Mr. Richardson.

Mr. BARTON. Does the gentleman yield back the balance of his time?

Mr. DINGELL. I yield back the balance of my time, and I thank you, Mr. Chairman.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF MICHIGAN

I welcome my friend and former Commerce Committee colleague Bill Richardson to this hearing. The Secretary has brought us a very comprehensive legislative proposal on electric utility restructuring, reflecting several years of work within the Administration and the expertise of a number of interested agencies. I expect the hearing to be informative and look forward to the Secretary's testimony.

Mr. Chairman, as we examine the Administration's bill and the other bills on electric utilities, three general areas should be pursued.

*First*, how will these proposals affect the states? More than twenty states have enacted retail competition plans in one form or another. Does Congress need to micromanage their activities?

What burdens would the Administration's bill impose on the states, and which state prerogatives would it foreclose? Does the bill transfer to state utility commissions authority normally exercised by state legislatures—and if so, is this desirable? What proceedings would states have to conduct—and how much will they cost? Would states which have already considered competition have to hold extensive new proceedings to conform with the bill's "opt out" requirement?

*Second*, are we talking about deregulation or more regulation? The Administration would confer broad new authorities upon the Federal Energy Regulatory Commission (FERC). The FERC has a difficult and important job to perform in overseeing the electric industry during a time of rapid change. It is possible that, after thorough examination, the Committee may determine that new grants of regulatory authority such as the Administration bill proposes are in fact warranted.

However, there is some irony in the suggestion implicit in this bill that, in order to make markets more competitive, Congress must more closely regulate various aspects of industry behavior. Congress gave FERC substantial new authority in the Energy Policy Act of 1992, and since then the Commission has issued a number of important transmission orders. Some of these are still under review in the courts, and only last month FERC issued a major proposed rule on regional transmission organizations. In the midst of such rapid change, it is imperative that the Committee understand the extent and status of FERC's current authority before deciding whether or not to amend the Power Act again.

*Third* and last, what other policies are covered under the umbrella of utility restructuring? The Administration bill includes a number of noteworthy miscellaneous provisions which may or may not be related to the core issues in any electric re-

structuring bill. The legislation would promote a number of social and environmental policies with varying degrees of connection to the central debate, including:

- a renewable energy portfolio that recognizes some, but not all, renewable sources;
- a NO<sub>x</sub> trading program to help EPA carry out an initiative which has been struck down by the courts;
- a public benefits program to provide matching grants to states, which is apparently intended to cushion the impact of retail competition. It is of particular concern to me that this new federal fund, which will ultimately be financed by consumers, appears to be susceptible to the same budgetary diversion as has afflicted the Nuclear Waste Fund. This is not a path the Committee should lightly tread again.

While it may be that these provisions have some merit, they have a uniformly regulatory cast which warrants our close attention in the context of a bill designed to promote the operation of the free market.

I look forward to hearing the Secretary's testimony, and to asking him questions about the very significant legislative proposal he has brought before the Committee.

Mr. BARTON. Before we introduce Mr. Largent for an opening statement, the Chair wants to make a point of personal privilege. Susan DeLay, who is my senior district representative from Arlington, Texas, recently married, is standing in the back of the room and we welcome you, and if you want to sit down, we do have a chair for you. We just can't let you sit where the Secretary of Energy is sitting. That is reserved for special people.

The Chair would recognize Mr. Largent.

Mr. LARGENT. Thank you, Mr. Chairman. I too want to welcome the Secretary here today and thank him for his leadership at the Department of Energy on this important issue.

I think that this particular issue presents a lot of opportunities for the entire country that we will have the opportunity to benefit in many, many ways, other than just seeing our electric bills go down. I think the opportunities for job creation, economic growth, improved environment, are many and so I want to thank him for his leadership.

I think the ranking member raises a number of important questions and I hope that he will take the time to listen to the responses in this meeting, and I think he will get some satisfactory answers to the questions that he raised as a result of the Secretary's testimony here today and I yield back the balance of my time.

Mr. BARTON. The Chair would recognize the distinguished ranking member of the subcommittee, Mr. Hall, for an opening statement.

Mr. HALL. Thank you, Mr. Chairman. Of course I welcome Mr. Richardson. The bill that they sent us this spring I think has served pretty well to advance the debate. It frames the issues for the subcommittee very well. Since you were here last, Mr. Richardson, the Texas legislature has passed a very comprehensive utility restructuring bill that is going to be signed into law by President—Governor Bush tomorrow. We will have some important questions to ask you and we thank you again for your presence.

Mr. BARTON. I thank the gentleman for that opening statement. Does the gentleman from Tennessee, Mr. Bryant, wish to make an opening statement?

Mr. BRYANT. Thank you, Mr. Chairman. I am not sure that I can top that. I may just let that lay out there to be taken into consideration by all those here.

Welcome, Mr. Secretary, and I thank you for being here today. I certainly out of great respect for you and your office will limit my remarks. We are all looking forward to hearing from you today on these very important issues. I am sure that we certainly miss you at third base as we approach that very important game next Thursday.

Mr. BARTON. The Chair recognizes Mr. Markey for an opening statement.

Mr. MARKEY. Thank you, Mr. Chairman, very much. I thank you for holding this hearing. I have been, as you know, developing ideas in this area as well, based upon my earlier discussions with President Dukakis, I mean President Tsongas—as a former future Cabinet officer in several administrations, I have learned to keep my own enthusiasm for future administrations very low. However, when there is a future administration, I am sure that Secretary Richardson will continue his streak of the largest number of Cabinet posts ever held by a single American, and that is because he is one of our great Americans.

And I thank you, Mr. Secretary, for your leadership in all of the areas, not just here at the Department of Energy, but when you were here on this committee and at the U.N. You have been one of the most distinguished Americans of this decade and I thank you. I think you will be remembered for that.

You know, here we are, I am up to my lifetime 100th hearing on the restructuring of the electric utility industry. I was thinking of missing it, but like Cal Ripken I thought that I would keep it going for a while longer. Perhaps there is an end in sight.

You have had every question posed and every conceivable answer that could be given, given. But out here there is still the remainder of the monopoly segment of the utility industry, and I appreciate their rabid enthusiasm for keeping monopolies in place. The same group of cable and local telephone and long distance telephone and wholesale electric monopolists sat here over the last 10 years, and this final group of monopolists sit here, continuing to hope that they can beat back the path of progress that will lead to lower electric rates and more job creation for our country. I understand that.

There are swimming pools and wings being built onto their homes even as we sit here right now, and they clearly don't want this bill resolved for yet another Congress. That is their only goal. They have no other goals. It is a natural instinct that all lobbyists have, and there are an infinite number of questions that they can raise about any bill, and I am sure that they are going to continue to do so, sitting out there.

The gentleman from Oklahoma and I have done our best in introducing a comprehensive piece of legislation to answer many of the questions that have been raised. Let me briefly discuss some of the key elements of our compromise. Rather than a date certain Federal mandate, our bill provides for a flexible mandate that allows States, municipal utilities, and co-ops the choice to opt out of retail competition if they conclude that moving to competition will have a negative impact on consumers, or if their monopolies just tell their States that they don't want any more competition, whichever is a more powerful influence on the State.

We have included provisions on reciprocity and PUHCA which are intended to further incentivize States to move toward competition. Our bill also gives the FERC new authority to take action to curb market power, which is absolutely critical as we move from the old world of rate-regulated utility monopolies to a competitive marketplace.

Under our bill FERC would be able to force utilities to mitigate their market power. If the utility failed to take appropriate action, FERC would be able to impose cost-based rather than market rates on the utilities' wholesale or retail sales, and could order a utility to turn over its transmission facilities to a regional transmission organization.

In addition, the Largent-Markey bill contains a number of important provisions to protect consumers and the environment. It gives the FTC the authority to mandate uniform consumer disclosure requirements, including information regarding prices, generation sources, and generation emissions. It prohibits cramming or slamming and protects privacy, and it contains a number of provisions aimed at ensuring that restructuring does not degrade environmental protections. We have new tax credits for renewables and energy efficiency which are aimed at incentivizing investment in and expansion of renewables generation and efficiency. We have net metering and interconnection provisions aimed at fostering the growth of cleaner distributed power generation.

We took the administration's bill as a working document. We modified some of the sections trying to bridge the gulf between the various philosophies and regions on this committee in an effort to produce something that ultimately may be passable. I don't think that either of us contend that it is necessarily the Magna Carta but it is a working, living document that has tried to deal with the times—

Mr. BARTON. Would the gentleman from Massachusetts understand that opening statements, with the exception of the ranking members of the full committee and the chairman and subcommittee chairman are normally 3 minutes.

Mr. MARKEY. I yield back the balance of my time, Mr. Chairman.

Mr. BARTON. We appreciate the opening statement. The gentleman from Massachusetts has done yeomen's work and is one of many informed members of the subcommittee on this issue.

The chairman of the full committee has just arrived, and the Chair would be happy to recognize the distinguished gentleman from Richmond for an opening statement.

Chairman BLILEY. Thank you, Mr. Chairman. I apologize for being late. I want to commend you not only for holding this hearing on H.R. 1828, the Comprehensive Electricity Competition Act, but also your leadership on this issue.

I know that the success of Congressman Pickering's working group is in no small part attributable to your hard work. I want to personally thank you, Secretary Richardson, for your appearance today and for your tireless efforts in championing a competitive electric power market. Your participation, Mr. Secretary, I am confident will make this hearing most useful.

"Retail competition will be good for consumers, good for the economy and good for the environment." Those are your words, Mr. Sec-

retary, but they could have as easily been mine. I am a Republican and you a Democratic, but we both agree that a true competitive electricity power market at both wholesale and retail levels benefits all Americans. To its credit the Department of Energy's leadership in producing credible administration-wide analysis of competition's impact on the economy makes clear that every customer, urban and rural, wins with competition. And it highlights the fact that efforts to short-circuit the process by going to other departments that have no expertise in energy are futile and lead to short-lived and incorrect conclusions.

I believe it is fair to say that we both believe that competition will lower all consumers' electricity bills. Choice leads to a more efficient and leaner industry. It sparks innovative technologies and services whose benefits will reach far. We both also share a strong resolve that without comprehensive Federal restructuring legislation, all the benefits of competition will not accrue and those benefits will not reach all consumers. This is an issue that is vital to our national economy and impacts businesses across the country. I hope the next time groups like the Chamber of Commerce consider this issue, they listen to all of their members and call for congressional action to spur retail markets.

While there are still several details on which we disagree, I am confident with hard work and cooperation we will overcome any and all obstacles to a comprehensive Federal electricity bill ushering in competition and consumer choice. We must work together to reach our mutual goal of a truly competitive electricity power market.

Again, Mr. Chairman I commend you for holding this hearing. I look forward to hearing the Secretary's testimony and I thank you, and I yield back the balance of my time.

Mr. BARTON. We thank you. Let me say, Mr. Chairman, your willingness to support an open process and allow full participation in a thorough series of hearings, if we get a bill, it is the reason that we are going to get a good and comprehensive bill. It is your leadership that is moving this forward in conjunction with the administration; it is the reason that we are at this stage today.

The Chair would recognize the gentleman from Ohio, Mr. Sawyer, for an opening statement.

Mr. SAWYER. Thank you, Mr. Chairman. I am not going to take full advantage of the time that you have allotted for opening statements, but let me emphasize that I am convinced that the path that we are on is something that will take place at this juncture in our experience, a 100-year experience with the electric industry, not because it is so long overdue, but because finally at long last it can happen.

At the heart of that change is, I believe, a transmission system that is the backbone of what will make retail competition possible. That transmission system in order to be an effective medium for competition has to be large and strong enough, interconnected enough, flexible enough and sufficiently capable of attracting the kind of capital that it will take to maintain itself and to grow in response to the commercial and residential needs of the Nation.

I note in particular that the administration proposes mandating transmission owners to join a regional transmission organization.

I think that is one potential model but it is clear at least to me that we need a flexible framework that is adaptable to many different conditions in many different parts of the country. I am interested in hearing your thoughts on that flexibility.

I suggested it before, but let me emphasize again, the ability to maintain and raise capital to grow the grid, I think, is a critical element in real retail reform.

In closing, let me mention that in some ways we are really in the same condition that the U.S. highway system was at the end of the Second World War. You could get from any place in the country to any place in the country, but on that system you ran into many roadblocks, bottlenecks and a lot of backed-up traffic. It took the thoughtful design of an interstate highway system along a consistent Federal model that recognized differences in various parts of the country and that was capable of meeting the growing changes of the country that led us to have the commercially important transportation system that we have today.

In no small way, the transmission system of an electric grid represents the same critical element in the commercial future of the Nation. I look forward to hearing your comments. Thank you, Mr. Chairman.

Mr. BARTON. Thank you, Congressman Sawyer. The gentleman from Illinois, Mr. Shimkus, is recognized for an opening statement.

Mr. SHIMKUS. Thank you. When the ranking member went through his list of questions, I saw, Mr. Secretary, you called up Rich Glick to the table to help you be prepared to answer those questions, and I appreciate and I want to thank you for being involved in the working group and allowing Rich to sit in, on a weekly basis, the working group headed by Congressman Sawyer and Congressman Pickering. I think it is going to be the foundation for movement on this issue and I think it has been very valuable and we have covered a lot of issues. I hope Rich is taking back all of the good information that we are discussing. I want to thank you for being part of that process. You were the first one who came before the working group and I want to thank you for that.

Mr. BARTON. We thank the starting catcher for the congressional baseball team for that statement.

We welcome the opening statement from the gentleman from Chicago, Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman. After weeks and months of hearings on electricity restructuring, it appears that this subcommittee is finally moving toward legislative hearings and marking up a bill. As you know, in 1997 my home State of Illinois began the process of electricity competition by passing its own consumer choice bill. The State's law provides for a phased-in schedule for customer choice beginning October 1, 1999 through May 2002.

In the State law, however, electric co-ops and municipal systems may elect to enter the competitive marketplace to offer their customers choice, but they are not required to participate. Currently my district does not have any cooperatives. However, I am curious as to how the administration's bill will effect how Illinois has chosen to treat cooperatives.

Furthermore, in light of what can be a trend started in New York city of intercity cooperatives, I have further interest in how

smaller cooperatives which might possess few transmission lines might be affected by new FERC regulations such as transmission tariffs.

Additionally, Mr. Chairman, I want to ensure that we get a bill that will truly produce competition and not simply establish greater regulation and thus stifle what we originally set out to do. I support greater competition, greater reliability and most of all greater consumer protection. To the extent that a bill comes before this committee that provides these elements and also is in accordance with what the State of Illinois has begun, that bill will have my support.

Mr. Chairman, I look forward to today's hearing and I thank the Secretary for joining us today.

Thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. BARTON. We recognize Mr. Burr for an opening statement.

Mr. BURR. Thank you, Mr. Chairman. I would use that time to welcome the Secretary and I yield back the balance of my time.

Mr. BARTON. The Chair recognizes the gentleman from Maryland, Mr. Wynn, for an opening statement.

Mr. WYNN. Thank you, Mr. Chairman. I would like to thank you for your hard work. This is obviously a very difficult and complex issue and you have done a lot of good work on the issue. I too am looking forward to hearing from the Secretary and specifically his comments in a couple of areas.

First, consumer savings for the retail customer. I think it is abundantly clear that large wholesale customers will do very well under a deregulated scheme. It is less clear that consumers at the neighborhood level will achieve those savings. I would certainly like to hear the Secretary's comments on that.

Second, my State of Maryland has also entered the deregulation business. We have our own program in place which I think is a very sound one. I would also like to hear the Secretary's comments with respect to what the appropriate Federal role should be in light of the fact that so many States have already moved in this area, and specifically what role the Federal Government should play on the question of stranded cost.

I welcome you, Secretary Richardson, and I look forward to your comments. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. BARTON. Thank you, Congressman Wynn.

Before I introduce Congressman Pickering, coming into the hearing room are 47 Girl Scouts from my district down in Fort Worth, Texas. Welcome to Congress and welcome to Washington, DC. With that, we would welcome Mr. Pickering for an opening statement.

Mr. PICKERING. Thank you, Mr. Chairman, I want to welcome the Secretary and thank him for his commitment. I kind of feel like I am hidden over here.

Mr. BARTON. They can hear you.

Mr. PICKERING. I want to thank you for your leadership and Chairman Bliley for his leadership. I do think that we are reaching critical mass in the working group and the different individuals and committee members that have worked hard putting proposals together. Again, I just thank you for your leadership and the point

where we are today; I think we are close to reaching an agreement that can give us the momentum to move forward on this very critical issues. Thank you, Mr. Chairman.

Mr. BARTON. I would ask the young ladies if you can go out in the hall. As soon as I recognize Secretary Richardson, I will come out and visit with you.

Seeing no other members—

Mr. PICKERING. We still extend the invitation to the Secretary to join us next Thursday on the baseball field.

Mr. BARTON. We are working on that.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF MISSOURI

Thank you Mr. Chairman. I welcome the opportunity to continue the dialogue on electricity deregulation. As the last major industry to approach deregulation in current history I think it is important that we carefully consider all options and act with measured reason.

Our states are the incubators of change and progress. In conjunction our actions at the Federal level should compliment their successes and be mindful of the potential negative impacts which might occur through a federal mandate. I represent a district in a low cost state—Missouri. My concern is that consumer's in my district and state are not paying more for power supplies that potentially could be less reliable.

There are some good items in this measure and our challenge is to refine them and develop a consensus on the matter. One which I view as a positive step deals with the renewable energy provisions. Employing these green technologies make sense and in the long-term yields a comparative advantage through competition and for our environment. Affording incentives for utilities to pursue a strategy utilizing renewable sources is positive and a provision which should be enhanced.

When I am home in my district each week, I visit with constituents in a number of settings both formal in community meetings and informally at the City Market or car wash. In my conversations with these individuals they express opinions on a variety of issues. Every time the subject of electricity deregulation comes up—they as a consumer assume that their rates will go down and their service will remain the same. Our experiences from other industries suggest that improvements can occur but the next step of better rates and service does not always follow.

Our challenge is to make this perception among the citizens a reality. In order to accomplish this the consumers both residential and commercial must be foremost in our mind as we continue to move forward on deregulating electricity. When looking at stranded costs we ask how will this effect the consumer. In deciding if the state regulatory body or state legislature should determine "opting out" of retail competition—we ask how will this effect the consumers. As the evolution of FERC's authority is refined—we ask how will this effect the consumers.

I welcome today's dialogue as another step toward a measured approach for addressing electricity deregulation. Ultimately we are talking about people's light and heat—we have to get it right—errors could make the difference between life and death.

I yield back, the balance of my time—thank you.

PREPARED STATEMENT OF HON. TED STRICKLAND, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF OHIO

Thank you Mr. Chairman. I would like to take this opportunity to thank the Secretary for appearing before us today to respond to questions about the Administration's proposal for restructuring the electric industry. I welcome you and I look forward to your testimony.

Briefly, I will mention some of my concerns for rural southern Ohio as we consider electricity restructuring legislation. I represent fourteen counties in southern Ohio, twelve of which are Appalachian Counties. The southern part of Ohio enjoys very reasonable, low-cost electricity. This is not the case in the northern part of the state of Ohio. I am concerned that under retail competition, my constituents will see their rates increase over time and they will not be part of the \$20 billion annual savings assured consumers under H.R. 1828. These low energy costs help us compete for



jobs and economic development that are so desperately needed in this region, which faces unemployment rates of nearly 12%.

At this subcommittee's March 18, 1999 hearing, the Chairman of the Public Utilities Commission of Ohio, Mr. Glazer, testified that: "Ohio has high electric costs in the northern part of our state (up to 12 cents per kWh), and much lower costs in the southern part of the state." Given this statement, I asked him how he thought electric restructuring could result in a reduction of electric costs in the southern part of the state. He responded that states surrounding Ohio, such as Kentucky and West Virginia, have rates below those of southern Ohio and therefore, my constituents could expect to see lower electric rates if retail competition were implemented. While that may be possible, I wonder what happens if West Virginia and Kentucky do not adopt retail competition plans. I am very interested in hearing your testimony on both the "opt-out" and reciprocity provisions included in H.R. 1828.

I am also concerned about the impact the environmental provisions of H.R. 1828 will have on the economic well-being of southern Ohio which is dependent upon coal-fired power plants.

Finally, Mr. Secretary, it is my pleasure to welcome you here today to discuss a very complicated issue and I thank you for coming to the Hill to answer our questions. Although, I have outlined some of my general concerns and interests, I look forward to your entire testimony.

Mr. BARTON. Mr. Secretary, you are going to be recognized for such time as you may consume as soon as the Girl Scouts and their sponsors leave.

Mr. Secretary, we do welcome you to the subcommittee, and you are recognized for such time as you may consume. Your entire written statement, which was on time and we appreciate that, is in the record in its entirety. We welcome you to the subcommittee once again, and you are recognized for your opening statement.

#### **STATEMENT OF HON. BILL RICHARDSON, SECRETARY OF ENERGY**

Mr. RICHARDSON. Thank you very much, Mr. Chairman and members of the committee. It is good to be back in the House and in my old committee, the best committee in the House, I am convinced.

Let me also thank many of our colleagues for the gracious remarks they have made. I wanted to commend your process. We have worked together with the Pickering group, we have participated in many hearings. We have been engaging in a good dialog. I hope that continues, and we are ready to work with you as we move ahead with a bill.

I was particularly pleased that Congressmen Largent and Markey and Burr attended the administration's unveiling of our bill and I then attended Congressman Largent's and Markey's bill unveiling, and I think it is the spirit of cooperation that is working so well. I want to commend Congressman Pickering's group for bringing many important issues to our attention.

Mr. Chairman, the Clinton Administration supports restructuring because we believe that retail competition, as provided for in the administration's bill, will be good for consumers, good for the economy, and good for the environment. Companies that had no incentive to offer lower prices, better service or new products are now going to compete to earn your business. Twenty-two States have already acted on restructuring proposals to allow consumers to choose among competing power suppliers; Texas, I believe, being the last one. Almost every other State is considering it.

Clearly States are leading the way, as they should be, but if State programs are to reach their full potential, Federal action is

necessary. Electrons do not respect State borders. Electricity markets are becoming increasing regional and multiregional. Actions in one State can and do affect consumers in another. States alone can't ensure that regional power and transmission markets are efficient and competitive. They can't ensure the reliability of the interstate power grid. They can't remove the Federal statutes that impede competition, and they can't provide for meaningful competition in regions served by Federal utilities.

Mr. Chairman, the absence of Federal legislation is having a real impact. Utilities have postponed making important decisions until they learn from both State and Federal Governments what the new rules of the road will be. As a result, generating capacity reserve margins are being squeezed in some places, and that is evident by some of the opening statements today.

Last summer we saw what can happen when decisions are delayed. A combination of hot weather, severe storms and tight generating and transmission capacity produced serious power shortages that caused huge price spikes in the Midwest. Just last week it took only a brief heat wave to stretch power supplies in New England to the limit. While major power outages were avoided, the fact remains that insufficient transmission and generating capacity was the chief culprit and it will be again unless the rules are made clear, and soon.

In April I delivered to Congress the administration's plan for these rules of the road. This legislation includes provisions we feel are needed to make the most of State and retail competition plans. Our proposal would save consumers in all 50 States at least \$20 billion per year, and I notice that Congressman Dingell raised some very important issues and questions. And as a result of the questions that he asked me recently, we ordered a full economic study to try to answer those questions. The study has been completed and I would be pleased to respond to some of those questions relating to the economic and environmental and competitive impact of this legislation.

Our legislation would reduce greenhouse gas emissions by the year 2010 by the equivalent of that generated to power 30 million American homes. At the same time, it offers State and local flexibility, which I think is essential to make legislation work. Nearly half of the States have already adopted retail competition programs. Eighteen of this subcommittee's 31 members represent States that have taken action. We believe all States should, but we are not advocating a "one size fits all" solution.

In our legislation, all consumers could purchase power from the supplier of their choice by January 1, 2003. However, individual States and non-regulated utilities could opt out from this requirement if they find that their consumers would be better served by another policy or the current monopoly system. This approach recognizes that individual States and non-regulated utilities may face unique challenges, and they need the leeway to deal with it.

Mr. Chairman, let me take a moment to outline what the administration bill does. First it empowers all consumers to reap the full benefits of competition.

Second, it makes the electric grid more reliable.

Third, it promotes more efficient and competitive interstate markets.

Fourth, it removes Federal roadblocks to State competition plans.

Fifth, it allows Native Americans, tribes and others living in remote areas to participate in the competitive marketplace.

Sixth, it removes roadblocks to competition in the regions served by the Tennessee Valley Authority and the Federal Power Marketing Administration. They should compete like everybody else.

And last, it enhances the environmental benefits associated with competition, which includes making renewable energy and conservation part of the mix. This is why we have increased the renewable portfolio standard. Yes, to make the bill greener.

When we unveiled the administration's bill in April, I was joined by 3 members of this subcommittee, by several members of the Cabinet, and more than 20 representatives from diverse interests, from investor-owned utilities to consumer groups, to power marketers, to independent power producers. While they did not necessarily all agree on the administration bill or on any one single approach, their message was loud and clear: The time for Federal legislation is now.

As I said, Mr. Chairman, we want to work with you and the other members of the full committee, on a bipartisan basis. I too commend Chairman Bliley's initiative in setting forth a dialog to get a bill passed this session to get the job done, and I would be very pleased to answer any questions any member of the subcommittee would have. Thank you.

[The prepared statement of Hon. Bill Richardson follows:]

PREPARED STATEMENT OF HON. BILL RICHARDSON, SECRETARY, DEPARTMENT OF ENERGY

#### INTRODUCTION

Mr. Chairman, thank you for inviting me to testify today on the Clinton Administration's Comprehensive Electricity Competition Act (CECA).<sup>1</sup> This legislation lays out our vision for the role the Federal government should play in the transition to retail competition.

The Clinton Administration supports electric restructuring because we believe that retail competition, as provided for in the Administration bill, will be good for consumers, good for the economy and good for the environment. Companies that had no incentive to offer lower prices, better service, or new products will now compete to earn your business. Consumers will save money on their electric bills. Lower electric rates will also make businesses more competitive by lowering their costs of production. By promoting energy conservation and the use of cleaner and more efficient technologies, greenhouse gas emissions will be reduced.

The rules and regulations that, since the New Deal, defined and directed the delivery of electricity to consumers are disappearing. Twenty-two states have already approved restructuring proposals to allow consumers to choose among competing power suppliers. Almost every other state has the matter under active consideration. What once appeared to be an experiment by a few high cost states, is now a trend that is sweeping the nation.

States are, and should be, leading the way, but Federal action is necessary for state restructuring programs to achieve their maximum potential. Electrons do not respect state borders. The fact is that electricity markets are becoming increasingly

<sup>1</sup>The Administration transmitted CECA to Congress in two separate parts. The first part, which was introduced by Congressmen Bliley and Dingell (upon request) as H.R. 1828 on May 17, includes all of the non-tax-related provisions in the Administration's proposal. The portion of the legislation which would amend the tax code has not yet been introduced in the House of Representatives. Both parts of the bill were introduced in the Senate by Senators Murkowski and Bingaman (upon request)—S. 1047 and S. 1048—on May 13.

regional and multi-regional. Actions in one state can and do affect consumers in another.

States alone can't ensure that regional power and transmission markets are efficient and competitive. And they can't provide for the continued reliability of the interstate bulk power grid. Moreover, states can't remove the Federal statutory impediments to competition and enable competition to thrive in the regions served by Federal utilities.

The fact is that retail competition can't and won't reach its full potential without comprehensive Federal electricity restructuring legislation. Neither state nor Federal regulators have the necessary tools to ensure that electricity markets operate as efficiently as possible without complementary action by Congress.

Significant uncertainty remains. Utilities have deferred making important decisions on new generation and transmission resources because of the uncertainties over the rules of the road they will be operating under. As a result, generating capacity reserve margins have tightened. Last summer, we witnessed the impact of the delay in decision making when a combination of hot weather, severe storms and a shortage of generating capacity led to significant power shortages that caused large price spikes in the Midwest. Just last week, during a brief heat wave, power supplies in New England grew very tight. While, fortunately, major power outages were avoided, the fact is that insufficient generation and transmission capacity was a contributing factor. Because the New England states are proceeding with restructuring programs, major capacity additions are being planned for that region and capacity shortfalls should be avoided in the future. Unfortunately this is not the case everywhere. Utilities and other market participants need to know what rules and regulations they will be operating under in order to respond to generation and transmission capacity shortages. Legislation laying out the Federal regulatory framework for restructuring would go a long way towards eliminating the uncertainties that exist.

#### *Comprehensive Electricity Competition Act*

On April 15, I transmitted the Administration's Comprehensive Electricity Competition Act to Congress. This legislation contains the provisions which we believe are necessary to maximize the benefits associated with state and local retail competition programs. The Department of Energy's Office of Policy recently released its Supporting Analysis for the Administration's proposed legislation, copies of which have been made available to the Committee. This analysis estimated the economic and environmental benefits associated with retail competition and the Administration's legislation and concluded that (1) annual savings of at least \$20 billion per year would be achieved; (2) residential consumers in all states would benefit from retail competition and (3) greenhouse gas emissions would be reduced by an estimated 40 to 60 million metric tons annually by 2010.

Mr. Chairman, I would like to take a few minutes to outline many of the key provisions included in the Administration's bill.

#### *Removing Statutory Impediments to Competition*

The existing Federal regulatory framework for the electric power industry was established with the enactment of the Federal Power Act and the Public Utility Holding Company Act (PUHCA). This framework does not readily accommodate state initiatives to institute competition among retail suppliers. In fact, certain Federal statutes may prove unworkable in restructured markets.

CECA includes several provisions designed to remove these impediments. For instance, the Federal Energy Regulatory Commission (FERC) would be provided with clear authority to enable retail transmission access to complete an authorized retail sale. In addition, the bill would repeal PUHCA, but provide for increased access to holding company books and records for state regulators and FERC.

#### *State and Local Flexibility*

As I mentioned earlier, the Administration supports restructuring and retail competition, as provided for in the Administration's bill, because it is good for consumers, the economy and the environment. While nearly half of the states have already adopted retail competition programs, we believe that all States and non-regulated municipal and cooperative utilities should be encouraged to embrace the benefits of retail competition. Our legislation establishes a target date of January 1, 2003, by which all consumers would be able to purchase power from the supplier of their choice. However, individual states and non-regulated utilities could opt-out from this requirement if they find, on the basis of a public proceeding, that consumers would be better served by an alternative policy or the current monopoly system.

This approach, while establishing a preference for competition, recognizes that individual states and non-regulated utilities may face unique challenges and should have some discretion. Those states and unregulated utilities that have already implemented competitive programs would be grandfathered-in by filing a notice with FERC.

#### *Promoting Competitive Interstate Markets*

Enacting a statute declaring that “there shall be competition” is not enough. Eliminating monopoly franchises and cost-of-service regulation still leaves in place the traditional vertically-integrated structure not suited for efficient and competitive markets.

Access to transmission facilities which remain a monopoly function must be available to all potential suppliers on a non-discriminatory basis. FERC’s Order Nos. 888 and 889 took critical steps in opening electricity markets to competition by requiring jurisdictional utilities to file open access transmission tariffs. However, effective competition requires that electricity suppliers have access to all necessary transmission facilities, regardless of ownership. The Administration’s bill would subject the transmission facilities of all utilities, including those owned by Federal, municipal and cooperative utilities, to FERC jurisdiction to provide for greater and more efficient competition. CECA would also codify FERC’s authority to impose open access requirements on jurisdictional utilities.

While open access reduces a transmission owner’s ability to discriminate in the provision of transmission service, the separation of the operation and control of transmission facilities from generation through participation in an independent Regional System Operator (RSO) structure would greatly reduce the risk that operation of the transmission system could be distorted to favor some generators or customers over others. An efficiently dispatched and properly priced bulk-power system might not develop absent the establishment of independent regional system operators. CECA would provide FERC with the authority to require that a transmission owner relinquish operational control over transmission facilities to an independent RSO.

In certain instances utility companies may have the ability to exercise market power by virtue of high concentrations of ownership of generation facilities in a particular region. The Administration’s bill would also provide FERC with the authority to remedy concentrations of market power in wholesale power markets. In addition, FERC would be able to remedy retail market power problems upon the request of a state implementing retail competition.

#### *Consumer Protection*

While we expect retail competition to benefit all classes of consumers, we are mindful that small consumers must be adequately protected. The Administration’s legislation contains a variety of provisions designed to ensure that consumers have adequate purchasing power and access to information and that electricity suppliers don’t engage in fraudulent practices.

One way that consumers can increase their purchasing power and access to low cost electricity in a competitive marketplace is through aggregation. Aggregation is the process whereby electric consumers join their loads in order to leverage buying power. While most State competition programs will encourage aggregation, it is essential that State and Federal laws not impose barriers for an entity to participate in aggregation. The Administration’s bill would make it clear that no State or Federal law can be applied to impede aggregation in a competitive market.

Consumers will also need reliable information so that they can compare the products and prices offered by electricity suppliers and make informed choices. The Administration’s bill would enable DOE to require all electricity suppliers to disclose in a uniform, easy to read “label”, basic information on the price, terms and conditions of service, the type of generation source and generation emissions characteristics.

Certain service providers in the competitive long distance and emerging competitive local telephone markets have engaged in fraudulent practices, such as slamming and cramming<sup>2</sup>. There is a concern that slamming and cramming could also occur in a competitive retail electric market. As a result, CECA would empower the Federal Trade Commission to establish and enforce anti-slamming and anti-cramming provisions against unscrupulous power providers and marketers.

<sup>2</sup>“Slamming” is the practice of changing a customer’s service provider without that customer’s knowledge. “Cramming” is the practice of billing a customer for unauthorized or fictitious service.

### *Reliability*

The electric utility industry, through a tradition of voluntary self-regulation and cooperation, has performed admirably in maintaining reliability of the transmission grid over the past thirty years. However, in a highly competitive market environment, a different mix of incentives will be at work. There will be pressures to cut costs and to drive the power grids harder, to squeeze as much economic value out of them as possible. Moreover, since many transmission owners will also be in the power generation and marketing business, there may also be an incentive to exercise control over strategic parts of the transmission system for economic purposes, perhaps using reliability concerns as a pretext.

CECA implements the recommendations of the DOE Task Force on Electric System Reliability, chaired by Phil Sharp, and adopts almost all of the legislative proposal offered by the North American Electric Reliability Council (NERC). FERC would be given the authority to approve and oversee an organization that will prescribe and enforce mandatory electric reliability standards. FERC would review all mandatory reliability standards developed by the organization to ensure that they are in the public interest and reflect an appropriate level of reliability.

It is also essential that both states and the Federal government develop tools to minimize both the occurrence and impact of power outages. DOE has traditionally been relied on to evaluate power system failures and develop recommended actions to minimize recurrences. However, without a dedicated in-house capability, it would be difficult for DOE to carry out this function in an increasingly complex competitive market. As a result, we are proposing that an independent Electricity Outage Investigation Board be created to investigate major incidents and report its findings to DOE to prevent future outages.

In addition, we are proposing to approve interstate compacts for regional transmission planning among the states. Such compacts will enable states to address transmission capacity issues to avoid power outages.

### *Renewable Energy*

Retail competition has the potential to increase the amount of renewable energy generated because it will allow environmentally-conscious consumers to purchase “green” energy packages from suppliers. However, the inherent uncertainty of the transition to competition, the recognition of important environmental and energy diversification benefits from renewables, and the fact that existing Public Utility Regulatory Policies Act (PURPA)<sup>3</sup> requirements related to renewable energy are incompatible with competition suggests that Federal policy towards renewable energy should be revisited in the context of restructuring.

CECA would establish a Federal Renewable Portfolio Standard (RPS) that requires all electricity sellers to cover 7.5% of their electricity sales with generation from non-hydroelectric renewable sources such as wind, solar, biomass or geothermal energy by 2010. Retail sellers could meet the proposed RPS requirement by generating sufficient renewable electricity or by purchasing tradeable renewable electricity credits from those sellers that exceed the RPS requirement, or by some combination of these strategies. The RPS would also provide for double credits for non-hydroelectric renewable power generated on Indian lands.

To hold program costs down, the Administration’s proposal would allow electricity sellers to purchase credits from the Department of Energy at a cost of 1.5 cents/kwh. As a result, sellers would not be forced to pay excessive amounts for credits that are sold by other electricity providers that exceed the 7.5% RPS requirement.

The Renewable Portfolio Standard—together with the Public Benefits Fund, provisions regarding the use of combined heat and power and distributed power technologies, and consumer information about generation source and emissions characteristics—make up an important package of environmental provisions. This comprehensive group of measures will ensure that the economic benefits of restructuring are achieved in a manner that also benefits the environment.

### *Public Benefits*

The Administration is concerned that retail competition could lead to reduced support for electricity-related programs that provide important public benefits. Under cost-of-service regulation, programs supporting and promoting renewable generation, energy efficiency and low-income assistance were supported in part through utility rate structures, and utilities recovered the costs of approved programs within their monopoly service area as a part of the overall cost of service. In a competitive

<sup>3</sup> PURPA requires utilities to purchase the electricity generated at certain renewable and co-generation facilities at the utilities’ avoided cost. CECA proposes to repeal the “must buy” provision of that Act, prospectively.

environment, utilities may be unwilling to include in their rates the cost of programs not included in the rates of their competitors.

We support the creation of a public benefits fund (PBF) to provide matching funds to States for low-income assistance, energy efficiency programs, consumer education and the development and demonstration of emerging technologies, particularly renewables. The PBF would be funded through a generation or transmission interconnection fee on all electricity capped at 1 mill per kwh. No more than \$3 billion annually could be provided to the states for these programs.

#### *Rural and Remote Areas*

While our analysis concludes that rural America will benefit from electric restructuring, we recognize that some have expressed concerns about the impact of competition on rural areas. As a result, the Administration has proposed that a "rural safety net" be available should expectations associated with competition not be realized. Under the safety net provision, a national wires charge of up to .17 mills per kwh would be available to generate funds if the Secretary of Energy determines that competition has adversely impacted rural consumers.

The Administration's Comprehensive Electricity Competition proposal is projected to provide significant benefits to electricity consumers connected to the three major power grids that serve the continental United States by accelerating the transition to competitive electricity markets. However, the situation of remote communities that may not be connected to the major power grids or that have transmission constraints merits particular attention. These communities, which may not have access to competing suppliers, also face high costs which can pose a significant barrier to economic development. The Administration bill would authorize grants programs for persons living in remote communities and Indian tribal land to address their electricity needs.

#### *Federal Utilities*

Three of the four remaining Federal Power Marketing Administrations<sup>4</sup>—Bonneville Power Administration (BPA or Bonneville); the Western Area Power Administration (WAPA); and the Southwestern Power Administration (SWPA)—own transmission lines in the regions they serve. In fact, Bonneville is the major transmission owner and operator in the Pacific Northwest; with over 75% of the region's high voltage transmission capacity, with major links to Canada and other regions of the United States.

As I discussed earlier, we believe it is important that FERC's open access authority extend to transmission facilities owned by the PMAs. We also believe it is essential to the proper development of competitive markets that Federal transmission facilities be subjected to other regulatory requirements in a manner similar to those of other utilities. Therefore, CECA proposes to subject PMA transmission facilities to Federal Power Act regulation. Our legislation does, however, recognize that the unique obligations of the PMAs require slightly different regulatory treatment than that accorded other utilities. For instance, FERC, in setting transmission rates for the PMAs, would be required to ensure that amounts collected are sufficient to cover costs so that the PMAs can repay what they owe the Treasury. In addition, our proposal would allow FERC to allow the PMAs to impose transmission surcharges in limited instances in order to pay for certain other costs, such as fish and wildlife remediation.

CECA would also subject The Tennessee Valley Authority's (TVA's) transmission facilities to Federal Power Act jurisdiction. However, Federal legislation needs to go further in order to enable competition to occur in the Tennessee Valley.

TVA supplies power to 159 retail distributors in a region including almost all of Tennessee and parts of six surrounding states. TVA also sells directly to 67 large industrial and Federal customers. Due to statutory and contractual restrictions, TVA is essentially the sole power supplier in the TVA region, and may only sell power elsewhere under very limited circumstances.

The Administration's bill would authorize competing utilities to sell power into the Tennessee Valley beginning January 1, 2003 and require TVA to renegotiate its contracts with existing customers on several matters, including the ability to purchase power from others after 2002. At the same time, TVA would be permitted, for the first time, to sell wholesale power outside of the Tennessee Valley in order to mitigate its stranded costs.

<sup>4</sup>The Southeastern Power Administration (SEPA) does not own transmission facilities and, therefore, is not subject to the provisions of CECA.

*Efficient Distributed Power and Combined Heat and Power*

The Administration believes that retail competition will spur the development of efficient distributed power (DP) and combined heat and power (CHP) technologies that will make our electric system more cost effective, reliable and environmentally friendly. However, there are currently certain statutory and regulatory barriers that act to impede the effective deployment of these technologies. Given the significant benefits associated with DP and CHP technologies, we have proposed actions to reduce these barriers.

For example, interconnection standards vary widely from utility to utility, thereby discouraging widespread use of distributed generation. CECA proposes to establish and implement national, uniform, and non-discriminatory technical interconnection standards to facilitate the hookup of distributed power generation systems to distribution utilities.

In addition, we are concerned that present tax code treatment of DP technologies may have the effect of discouraging their use in many types of applications. We are proposing to amend the tax code to clarify that the depreciation schedule for all DP equipment is 15 years. We are also proposing to establish an 8 percent investment tax credit for qualified CHP systems placed in service in calendar years 2000 through 2002.

*Municipal Tax-Exempt Debt*

We fully expect that public power systems will participate in restructured environments that allow competing, private generators of electricity to sell to customers who formerly had no option but to be supplied by those public systems. Currently, municipal utilities may finance their capital expenditures through the use of tax-exempt debt. The tax-exempt status of the debt would be jeopardized if a municipal utility participates in a competitive market. We believe that efficient, competitive markets depend upon leveling the playing field with respect to capital costs. At the same time, it is important that the tax-exempt status of debt previously issued by public power systems for existing facilities not be put in jeopardy if a municipal utility engages in competition.

Accordingly, the Administration is recommending that existing facilities financed with outstanding tax-exempt bonds should be free from the tax code's limitation, but that new generation and transmission facilities should be ineligible for tax-exempt bond financing. Municipal utilities would still be able to finance new distribution facilities with tax-exempt debt.

## CONCLUSION

When we released the Administration's bill on April 15, several cabinet officials and three members of this Subcommittee (Congressmen Markey, Largent and Burr) and I were joined on a stage by more than 20 people representing a diverse set of interests, including investor-owned utilities, municipal utilities, consumer groups, power marketers and independent power producers. While they did not necessarily all agree on the Administration bill, or any other single approach, their message was loud and clear—the time for Federal legislation is now.

Mr. Chairman, we are pleased that the Subcommittee on Energy and Power is holding hearings on electric restructuring. The Administration believes that Federal restructuring legislation is needed sooner, rather than later, and we want to work with you and the members of the Commerce Committee and staff, on a bipartisan basis, to get the job done. I would be glad to answer any questions which you or the other Committee members may have.

Mr. BILIRAKIS [presiding]. Thank you, Mr. Secretary. I am advised that probably within 20 minutes we are going to have 4 to 5 votes on the floor. Obviously you are accustomed to that. Would you please identify the gentleman to your right?

Mr. RICHARDSON. Yes, this is Richard Glick. He is the Energy Department's point man on the electricity restructuring bill.

Mr. BILIRAKIS. Thank you. I would advise all members of the subcommittee that all questions should be directed to the Secretary and not to the counsel, although the counsel obviously will be counseling Mr. Richardson.

I am going to yield to Mr. Hall to start off our questioning.

Mr. HALL. Mr. Secretary, as you have stated, 22 States have committed themselves to retail choice, and I guess by the time Con-



gress passes electric industry restructuring legislation, hopefully a majority of States will already have acted to restructure their industries. A lot of these States will have addressed issues like support for renewable energy, net metering, consumer information disclosure, and a lot of other things.

I guess my question is: Does the administration support grandfathering existing State plans that address these issues even if they don't address them in the same way that the administration would?

Mr. RICHARDSON. Congressman Hall, the answer is yes. A State public service commission or an unregulated municipal or cooperative utility that proceeds with retail competition by our deadline, which is January 1 of 2003, simply has to file a notice with FERC and is exempt from the bill's requirements to hold the proceeding to consider whether to implement competition. No State, however is grandfathered from any of the bill's other provisions that are related to transmission access, market access and market power, renewable energy and public benefits. We think that these issues are more interstate in nature and that everyone should participate.

Mr. HALL. I notice in your bill you create at least 15 new Federal regulatory powers over retail sales, local services, and generation in all of the 50 States, and these areas were traditionally regulated by the States. I could list the powers or give you a list of them if you would like. Among other powers, they included retail consumer aggregation rules, a section set out in the notation that I will give you, Federal requirements regarding State retail supply regulations; it goes on to FTC rules barring slamming and cramming and so on and so forth.

Do these new regulatory powers preempt the State in your bill?

Mr. RICHARDSON. No, they don't.

Mr. HALL. Will States that have already acted to restructure their industries, like my State has, be forced to change their laws in order to be in compliance with your requirements?

Mr. RICHARDSON. No, they would not be required to change their laws.

Mr. HALL. Does the administration have a grandfather clause that protects the 22 newly opened States like Texas from these Federal regulatory regulations; yes or no?

Mr. RICHARDSON. Yes.

Mr. HALL. Okay. That sounds like good news to me. I expected a "no" from you on that. I yield back the balance of my time, Mr. Chairman. I thank you.

Mr. Secretary, I am going to send you these 15 areas where it appears that the Feds have taken over powers that belong to the States and have you give me an answer in writing on that. And I thank you.

Mr. RICHARDSON. We will do that.

Mr. BARTON. We thank the gentleman from Texas. The Chair would recognize the distinguished full committee chairman for questions, Chairman Bliley.

Chairman BLILEY. Thank you, Mr. Chairman. Does the administration oppose enactment of stand-alone electricity legislation such as the stand-alone PUHCA bill?

Mr. RICHARDSON. Yes, Mr. Chairman.

Chairman BLILEY. Do you want to deal with electricity legislation in a comprehensive manner?

Mr. RICHARDSON. That is correct. We feel if we made it stand-alone, we would preclude our options to have a comprehensive bill.

Chairman BLILEY. Your testimony points out uncertainties over the rules of the road as discouraging electric suppliers from investing in generation and transmission. Has that uncertainty contributed, in your opinion, to tight reserve margins in some regions?

Mr. RICHARDSON. Yes it certainly has, Mr. Chairman.

Chairman BLILEY. Do you think congressional action will spark investment?

Mr. RICHARDSON. Yes, we think congressional action will spark investment, spark the need for capital and increase competition that is needed to get this process moving.

Chairman BLILEY. The Federal Government is the largest electric consumer in the United States. Do you have any estimate as to how much the Federal electric bill paid by taxpayers could be cut if we had nationwide retail competition?

Mr. RICHARDSON. We don't have estimates, but we know that it would be substantial. You are correct, the government is the largest energy consumer. Our analysis that was completed recently, which I would like to submit for the record, did not examine the impact on government electric bills, but it suggests that retail competition would produce significant savings for the Federal Government.

Mr. BARTON. Are you actually submitting that document?

Mr. RICHARDSON. If I could, Mr. Chairman.

Mr. BARTON. Without objection, so ordered.

[The following was received for the record:]

Supporting Analysis for the Comprehensive Electricity Competition Act (DOE/PO-0059, May 1999).—a paper copy has been provided to the Committee. It is also available on the Internet at [www.doe.gov/policy/ceca.htm](http://www.doe.gov/policy/ceca.htm).

Chairman BLILEY. Mr. Secretary, how much currently is the Federal Government spending on electricity? Do you have figures for that?

Mr. RICHARDSON. \$8 billion a year for total energy consumption.

Mr. BARTON. Our number is 55 billion kilowatt hours a year.

Mr. RICHARDSON. Including State and local governments, it is about \$20 billion per year for electricity. And I believe that the Federal Government figure is \$4 billion.

Chairman BLILEY. Thank you very much.

The administration bill has a flexible mandate and permits States to opt out if they find implementation of the retail competition requirement will have a negative impact on a class of consumers. How high a hurdle is that?

Mr. RICHARDSON. Mr. Chairman, what we want to do is make it feasible, make it easy for the opt-out to take place. Here is the standard. In other words, if a State regulatory commission decides to opt out of competition, can a court overturn that decision? The answer would be that our bill requires a State or nonregulated utility to make a finding, after holding a proceeding, that a class of consumers would be adversely affected before opting out.

What the bill does is it further prohibits a person from seeking a review of the State opt-out decision in Federal court. These decisions would be subject to State court review under State laws.

Mr. Chairman, while the State statutory language is ambiguous, we don't intend to allow a court to substitute its judgment for that of a State utility commission or a cooperative or a municipal utility. So we would only envision a court to opt-out or to disapprove of an opt-out decision if the procedural requirements weren't complied with.

Chairman BLILEY. Thank you. Thank you, Mr. Chairman.

Mr. BARTON. I thank the gentleman from Richmond. The Chair would recognize the gentleman from Michigan, Congressman Dingell for 5 minutes.

Mr. DINGELL. Thank you, Mr. Chairman. I would like to welcome my old friend, Mr. Richardson, back to his committee. Let's look at TVA and Bonneville. Both of these entities would continue their tax subsidies and their tax-exempt status. Both of them would continue their exemptions from antitrust laws under the administration bill; isn't that so?

Mr. RICHARDSON. That is right, Mr. Chairman.

Mr. DINGELL. And they then would be able to go in and sell under such terms as they felt were appropriate outside their region, would they not?

Mr. RICHARDSON. That is correct.

Mr. DINGELL. But it doesn't necessarily follow that they would sell in all parts of the country. For example, it wouldn't make available to the people, let's say of New York or Texas or Michigan, access to those cheap subsidized powers at TVA or at Bonneville, would it?

Mr. RICHARDSON. That is correct. But TVA is subject to antitrust laws. I wanted to point that out.

Mr. DINGELL. TVA is; but Bonneville is not?

Mr. RICHARDSON. Correct.

Mr. DINGELL. Let's talk about the Public Benefits Fund. Some States would pay more into this fund than others; isn't this true?

Mr. RICHARDSON. Yes.

Mr. DINGELL. Why?

Mr. RICHARDSON. Size, population, competitive markets.

Mr. DINGELL. Not all States would get equal benefits back, would they?

Mr. RICHARDSON. The distribution is based on population and other economic indicators.

Mr. DINGELL. Now, your bill also authorized FERC to order utilities to divest generation if the utility has market power in sales of electric energy for resale in interstate commerce?

Mr. RICHARDSON. That is correct.

Mr. DINGELL. Now, that has been built for the benefit of the utility and for the benefit of its customers over time, subject to the approval of the State regulatory agencies, is it not?

Mr. RICHARDSON. That is correct.

Mr. DINGELL. And so FERC is now going to come in and instruct the utility that they are going to have to divest that power without considering any of the questions that might be related to the needs

of the people in the area served? They will just come in and say sell this facility? Why?

Mr. RICHARDSON. Mr. Chairman, only in limited circumstances. FERC does not have unlimited power.

Mr. DINGELL. It says, it says, Mr. Secretary, that they can order to divest generation if the utility has market power in sales of electric energy for resale in interstate commerce.

Mr. RICHARDSON. Only if the utility has sufficient market power in the region.

Mr. DINGELL. Where is that in the bill?

Mr. RICHARDSON. That is in that provision that you just mentioned. In other words, it is not an unlimited authority. It is a specified authority that would be, we envision, exercised only in limited circumstances.

Mr. DINGELL. And the only defense that the utility has or the consumers of that particular State have is to go to court?

Mr. RICHARDSON. They can go to court. They can go to their consumer commission within the State.

Mr. DINGELL. The consumer commission has no authority under this to review the findings of FERC.

Mr. RICHARDSON. They primarily would have to go to court, but they would still have their legal options in that court.

Mr. DINGELL. That is all?

Mr. RICHARDSON. Yes.

Mr. DINGELL. And the court would be interpreting a statute of the United States and giving preferential consideration to the findings of FERC under the traditional rules of regulatory interpretation, would they not?

Mr. RICHARDSON. Yes. But—

Mr. DINGELL. Yes. Now, Mr. Secretary, I have limited time, and I am so much enjoying your answers that I have to move on. The bill also has a Federal mandate that all the utilities are going to open up retail competition by January 1 of 2003?

Mr. RICHARDSON. That is right.

Mr. DINGELL. And if they don't make that date, what happens?

Mr. RICHARDSON. Well, if they don't make that date—that is a very flexible date. That is several years from now.

Mr. DINGELL. No, no, no. It may be several years from now, but there is no flexibility. If they don't meet that, they have problems. What would happen?

Mr. RICHARDSON. The consumers would have the right to choose if they didn't meet that date.

Mr. DINGELL. So FERC would come in and issue an order?

Mr. RICHARDSON. No, FERC would not have that authority.

Mr. DINGELL. Who would then enforce this matter?

Mr. RICHARDSON. The State court would.

Mr. DINGELL. State court would?

Mr. RICHARDSON. What we are doing is giving the States the prime opt-out option to deal with any deadline, to deal with many of the provisions in the legislation. The States would have, in our judgment, more power than FERC to determine decisions like what you mention.

Mr. DINGELL. But there are two very narrow questions under which they could opt out. Just two. What are they?

Mr. RICHARDSON. They can opt out if there is a determination that the consumer is financially harmed. And they can opt out if their State legislature takes that position.

Mr. DINGELL. The State legislature or the State regulatory agency?

Mr. RICHARDSON. The State regulatory agency.

Mr. BARTON. This will have to be the gentleman's last question for this round.

Mr. DINGELL. Thank you, Mr. Chairman. I appreciate that.

In some States, the State regulatory agency makes those decisions, and under State law in others it is the legislature which has not delegated those responsibilities. You are then going to run roughshod over the State legislature which chose to make those decisions itself, are you not?

Mr. RICHARDSON. State regulatory authority, if you look at 22 States who have already taken action by their legislature—

Mr. DINGELL. That is not my question. You are going to ride roughshod over the legislators of the States who choose to take a different course?

Mr. RICHARDSON. I would think that the State-regulated entities, many are elected and many are responsive entities. We don't want the Federal Government making those determinations.

Mr. DINGELL. And you are going to ride roughshod over the State legislatures that have come to a different decision.

Thank you, Mr. Chairman.

Mr. BARTON. The Chair would recognize himself for 5 minutes.

Mr. Secretary, while we are on the point of date certain, there are different ways to do date certain. You can have a hard date certain; a State has to act by date certain or Federal law would preempt. The administration does not support a hard date certain; is that correct?

Mr. RICHARDSON. That is correct.

Mr. BARTON. You could also go exactly the opposite and not have any date certain. We could do what is in the Federal domain in terms of interstate commerce and certain transmission issues and just be totally silent so that States that have acted, obviously we would accept that if it didn't violate the Federal interstate commerce clause; but States that didn't want to act wouldn't have to, so you could go from a very hard date certain to no date certain. And the administration does not support that approach either, does it?

Mr. RICHARDSON. That is correct. We think that to encourage competition, you want to have a date. Now, we are ready to discuss with you flexible responses to achieving the goal within that time-frame.

I think if you don't have a date certain, you are not necessarily stimulating the competitive process and that is what we want to do. I believe that the reason that we have had such conclusive action by almost half of the legislatures and many more coming is because they see the prospect of competition. They want to get ahead of the curve on that.

Mr. BARTON. Because of some of the concerns that Congressman Dingell raised about requiring some finding of fact that consumers would be harmed, what would the administration's position be if

we had a date but there was no question of fact if the State wanted to opt out, you simply required that the Governor of the State submit a letter to the President, the Secretary of Energy, that the State did not choose to engage in retail competition, so you had a soft, soft date certain, what would the administration's position be to something like that?

Mr. RICHARDSON. We would have difficulty with that. We think that there should be some type of a finding. If you leave it up to the Governor, the State legislatures, you get into the arguments that I got into with Congressman Dingell: Is the State entity more viable than the Governor or the legislature? This is why I think a proceeding with a conclusive answer with at least the process moving forward is the best way to go.

Mr. BARTON. So you wouldn't trust the Governor of a State to simply submit a letter and we would just trust their judgment?

Mr. RICHARDSON. Well, I do trust Governors, but we want to have a proceeding of some kind. We want to keep talking to you about this.

Mr. BARTON. My next question is a personal question. What is your travel schedule for July and August? There is a reason that I am asking this.

Mr. RICHARDSON. Well, I will be traveling a lot.

Mr. BARTON. Do you think that it is important that this subcommittee actually produce a bill and try to have an open markup sometime this summer?

Mr. RICHARDSON. I think definitely, Mr. Chairman. I think that the Senate is looking toward this committee to take action. I think the competitive markets are aching for movement.

We want to get engaged in a process soon. We worry that the electoral season next year might preclude us from acting. If it means my staying in town to work with you, I will do that.

Mr. BARTON. I think it is very helpful to have the administration's point person on electricity restructuring in Washington when the subcommittee is marking up an electricity restructuring bill.

Mr. RICHARDSON. I will stay when you schedule your markup.

Mr. BARTON. Congressman Hall and I are discussing various proposals which have already been introduced, other members are going to be introducing proposals, and I am going to be meeting with Chairman Bliley, and Congressman Hall is going to be meeting with ranking member Dingell, and we have a working group established and so we are about to stop talking and start acting, I hope.

We would need your guidance and participation, or your designee. And so I would think that the next 2 months are going to be critical times and I would hope that you would try to be available if we give you enough notice.

Mr. RICHARDSON. I will be available, Mr. Chairman. What you just said is indeed music to my ears; that you might move in July for markup.

Mr. BARTON. Well, saying it and doing it, as you know, are not the same. I want to assure the audience that there is no bill that you haven't seen because we haven't put it together yet, but we are beginning to work in that direction. My time has expired.

The gentleman from New Jersey, Mr. Pallone, is recognized for questions for 5 minutes.

Mr. PALLONE. Thank you, Mr. Chairman. I wanted to ask the Secretary if he could clarify, under his bill or the administration bill, if the intention is for disclosure information or the labeling, so to speak, is to remain intact with every sale and resale of electric energy, even under an emissions trading program; and my question is whether that is the intent?

Mr. RICHARDSON. That is the intent.

Mr. PALLONE. Your bill allows electricity suppliers to sell interruptible power at certain times during the day to residential consumers. I wanted to ask, first, should utilities be allowed to sell interruptible power to residential consumers? What is your opinion? Obviously that is what the bill says, but what is the theory there?

Mr. RICHARDSON. We leave that up to the State to decide whether that should be interrupted. We, the FERC or any Federal entity, would not make the decision. So it would be up to the State.

Mr. PALLONE. Are there any protections in the bill to protect consumers from having their service interrupted if that is allowed?

Mr. RICHARDSON. The consumer protection entities within each State. Congressman, we feel that the State consumer entities are doing an adequate job of doing that.

Now, within the Department of Energy, we have talked about expanding our role without causing concern in the Congress to be able to ensure that consumers are protected, and we would find ways, once this legislation starts being implemented, to ensure those consumer protections. We would be open to additional advice from you on how we might do that.

Mr. PALLONE. There is nothing specific in the bill in that respect?

Mr. RICHARDSON. No, there isn't, but there is a perception that State regulatory agencies will do a good job.

Mr. PALLONE. The bill requires payments to the Public Benefits Fund to be collected by a non-Federal fiscal agent. Based on what has happened in the past, my question is whether the administration is confident that these funds, if held outside of the Treasury, will be available for their proposed purposes, without appropriation and without being subject to budget caps and sequestration?

Mr. RICHARDSON. We think that the money will be available. It is not subject to appropriation. We believe that it will serve the noble purposes that you mentioned in the opening statement for conservation, to help low-income people pay for their utility bills, provide for research and development of emerging clean technologies.

Mr. PALLONE. Currently States may block aggregation attempts by local entities, particularly local governments. I want to know whether the administration's bill provides sufficient flexibility for local entities to aggregate as cheaply and as efficiently as possible.

Mr. RICHARDSON. Well, here is an area where we do preempt the States because we want to encourage aggregation.

Mr. PALLONE. Does the bill have an explicit grandfather for States that have already passed and have enacted restructuring legislation?

Mr. RICHARDSON. It is not in the bill, but it is implicit, so that you can make that assumption. In other words, it is not drafted in the legislation, but it is implicit.

Mr. PALLONE. How is it implicit?

Mr. RICHARDSON. Well, if a State goes to competition, it has to file a petition with FERC. Perhaps if you think it should be a little more explicit, maybe we can work together to achieve that.

Mr. PALLONE. Okay. What about securitization of stranded costs. Do you think that the bill would encourage securitization of stranded costs?

Mr. RICHARDSON. We leave all recovery and securitization of costs issues to the States. We are just saying this is your issue and you decide.

Mr. PALLONE. Thank you.

Mr. BARTON. The gentleman actually stopped right on time.

The gentleman from Kentucky, Mr. Whitfield, is recognized for questions for 5 minutes.

Mr. WHITFIELD. Thank you.

Mr. Secretary, in the explanation of the administration's bill relating to section 701, it starts out that it will clarify EPA's authority to require a nitrogen oxide trading authority. Does that mean it is the position of the administration that they do not have that authority now?

Mr. RICHARDSON. This is our position. We clarify that EPA has authority to impose a cap and trade program for NO<sub>x</sub> emissions. We do clarify that. However, this language does not alter existing EPA authority to determine things like the geographic coverage or level of reductions required to address several regional transport considerations.

Mr. WHITFIELD. I am trying to determine if you feel the authority is there right now for them to do that.

Mr. RICHARDSON. We think that EPA does have that authority. We just want to clarify it.

Mr. WHITFIELD. This is just affirming it then?

Mr. RICHARDSON. That is right.

Mr. WHITFIELD. Second of all, it is my understanding that one interpretation is that this will preempt the State implementation plans and will broaden the control region beyond the 22 States that are involved in the SIP call that was issued in last fall's provisions.

Mr. RICHARDSON. It wouldn't do that. It would reflect the original premise. It would not go beyond that.

Mr. WHITFIELD. If this provision passes and it is determined that one State is violating the Ambient Air Quality Standards, then EPA would be required to issue new regulations that might preempt State law?

Mr. RICHARDSON. I think the answer is yes, but I want to get back to you with a definitive response, if I could for the record.

[The following was received for the record:]

Our proposal is designed solely to clarify EPA's existing authority to require a cost-effective interstate trading system for nitrogen oxide (NO<sub>x</sub>) pollutant reductions addressing the regional transport contributions of this ozone precursor needed to attain and maintain the National Ambient Air Quality Standards (NAAQS) for ozone. We do not propose changes to existing EPA authority to determine the geographic coverage, or the level, of reductions required to address regional transport contributions. In addition, our proposal does not include any changes to or clarification of



in section 184, which addresses addressing the establishment, authorities and operations of ozone transport commissions.

The proposal should assuage any misgivings States may have regarding participating in the optional market-based interstate allowance trading system permissible under EPA's 1998 rules. The proposal does not expand EPA's responsibility, which has existed under the Clean Air Act since 1970, to assure that each State implementation plan addresses not only the impact of its source emissions on air quality within its borders, but also any significant contribution of those emissions to air quality in other States.

The 1998 rules are the subject of ongoing litigation in the U.S. Court of Appeals for the District of Columbia. The proposal does not provide any directives that would modify the 23-jurisdiction coverage, or the State-by-State NO<sub>x</sub> budgets, provided in the challenged rules.

Mr. WHITFIELD. Okay. Then it seems like if that is the case, it also would preempt the interstate transport regions and transport commissions that were established under the Clean Air Act.

Mr. RICHARDSON. Congressman, that is not the intent. I think your questions are in the direction are we moving ahead to ratify the Kyoto treaty before going to Congress on climate change. That is not our policy. We are not going to back-door the Congress, the Senate on this.

We have stated on numerous occasions that we are not going to seek to cap emissions of carbon dioxide and other greenhouse gases until such time that the work in progress in the Kyoto Protocol is completed and you and the Congress have ratified it. So that is not our intent to set new policy.

Mr. WHITFIELD. I don't think you are trying to do anything with Kyoto, but there are significant changes here on nitrogen oxide. I just wanted to clarify that in my mind, and I look forward to working with you.

One other question. The recent decision of the American Trucking Association on the Ambient Air Quality Standards in which the court said that EPA had in essence exceeded their legal authority, does that decision in any way change the administration's view of the necessity of section 701?

Mr. RICHARDSON. I don't believe so. We are sticking with our policy.

Mr. BARTON. Mr. Secretary, you need to either sit forward or move the microphone.

Mr. WHITFIELD. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. BARTON. The gentleman from Massachusetts, Mr. Markey, is recognized for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman. My mother always said to me that the most important question to answer in all situations is, compared to what? The monopolists sitting out here have a secret bill that they all are holding very close, they don't want people to know about it, but they actually call it the "monopolist phantom menace bill," and it is subtitled "the utility empire strikes back."

Mr. BARTON. We want the monopolists to stand up.

Mr. MARKEY. The monopolists all believe in competition, but—everybody wants to go to heaven, but nobody wants to die. Everybody wants competition, but no one wants to give up their monopoly. I actually have the provisions in their bill and I would like to read it to you and see if the administration would sign this bill.

The first provision is that it forces consumers to pay \$20 billion more annually than they would under competition.

Second, it would prevent a reduction in greenhouse gas emissions of 40 to 60 metric tons annually by 2010.

Third in their plan, it degrades the reliability of the Nation's electricity grid by failing to establish any Federal oversight over the National Electricity Reliability Council or the various regional reliability councils, failing to create a sound legal basis for regional transmission organizations needed to assure reliable transmission and elimination of existing transmission constraints.

The fourth thing their secret bill does is it allows inefficient government-sponsored utilities like the TVA to continue to enjoy special privileges and immunities from competition, from antitrust laws, and from meaningful Federal oversight and regulation by the FERC.

Then it promotes protracted and expensive legislation by failing to properly clarify Federal and State jurisdictional boundaries.

Sixth, it undermines environmentally sustainable renewable generation sources by failing to replace outdated Federal mandates such as PURPA with up-to-date incentives such as a renewable tax credit and a renewable portfolio standard.

Seventh and finally, it ignores the threat of excessive utility market power by relying on PUHCA to restrain utility pyramids when the FTC already has amply demonstrated that it will not enforce PUHCA's restrictions and is willing to grant broad exemptions from PUHCA to any utility who wants one, without any significant limits, when what we should be doing is actually transferring some of that authority to an agency like FERC which might in fact protect consumers and ensure that we have competition.

So this secret bill is out here and when we actually begin a markup, every one of these provisions is either going to be put out as the full bill, or what they might try to do is give amendments to individual members so it actually has a virtual presence.

Could the administration ever sign a bill like that, Mr. Secretary, or would you recommend a veto?

Mr. RICHARDSON. We couldn't sign a bill like that. In fact, we like our bill and we also like the bill that you and Congressman Largent have proposed, with a few modifications.

Mr. MARKEY. Thank you. I appreciate that. You are the big cheese on the block, and we are willing to work with you, Mr. Secretary. That is all I really wanted to know. I think that is the most important issue before the committee.

Mr. BARTON. We thank the gentleman from Massachusetts.

The gentleman from Florida, Mr. Bilirakis, is recognized for 5 minutes.

Mr. BILIRAKIS. Thank you, Mr. Chairman. You know, Mr. Secretary, at the outset of your remarks you made a comment that States are leading the way, as they should. Then, you went on to say how very significant it is that there be Federal legislation, and you talked about the 22 States that are already doing this. I think you basically indicated that every other State is considering addressing to do so, et cetera.

So, I just really have to wonder why, particularly when you have an opt-out arrangement—whether or not it is in fact the true opt-

out that I like to think you intend it to be when you use words such as “reasonably mitigated,” which does nothing except create lawsuit after lawsuit. But I guess what I am wondering, since you are providing for an opt-out, you are providing for the lack of the uniformity that I suppose you would mean is necessary to have Federal legislation when in fact progress is being taken by the States. Any comment?

Mr. RICHARDSON. Yes. First of all we think that our bill, and I am not going to recite the litany, is good for the economy, the environment and consumers. But the reason that we think that we should have Federal legislation is that there are still a number of statutory Federal impediments.

I think you still have to provide for an efficient competitive transmission system. The Federal Government can do that. And then you have to deal with some of the Federal power markets that exist, the TVAs, the Bonnevilles that are in essence Federal entities. What you want to do with those Federal entities is promote competition.

I have had some utility representatives from your area tell me what they want is open competition, but there are still laws on the books, there is still bureaucracy that prevents them from achieving the full benefits of competition.

Mr. BILIRAKIS. I have heard the same thing and you are quite right, Mr. Secretary. I guess if we are talking about the Federal impediments, that is what I think we should be concentrating toward rather than in effect almost forcing competition. I just wonder if we are really concentrating on what we should be concentrating on these Federal impediments that you referred to.

But I would also suggest to you and maybe through you to Messrs. Largent and Markey, that the words “reasonably mitigated” to me do not connote or equal to, if you will, a true opt-out because of the hoops that one would have to jump through when in fact the Public Service Commissions of the State, opt out rather than having to go through the hoops of particularly the words “reasonably mitigated.” Let me jump to another subject, but I would like to say that my support would be subject to maybe a re-addressing of that particular area.

On the renewables, your bill sets up the standard, et cetera, et cetera. For instance in Florida, I am going to be parochial here, but there are a lot of other States in the same category, they would have a tough time meeting that standard because of the geography of the State and the resources available. Solar energy is the one renewable energy source that Florida has an abundance of, but it is so very, very expensive so it is not really that practical. I would suggest that be taken a look at.

Mr. RICHARDSON. Well, Congressman, you have a lot of coal in Florida, coal-fired plants.

Mr. BILIRAKIS. All right.

Mr. RICHARDSON. And while there may not be enormous potential of solar and wind in parts of the Southeast, some coal plants can take advantage of using biomass. That is one of the four, solar, wind, geothermal, and biomass, that we have as a renewable standard for coal-firing purposes. This is clean and this counts as a renewable.

So we think that this 7.5 percent is reasonable. It would promote renewable energy production. We are doing a lot of good research on solar and wind in the Department of Energy will make them more commercially viable, technologically more advanced. So we think that this is a modest number and we think that your region would benefit, especially with—well, with solar and all of the sun that you have.

Mr. BILIRAKIS. My time has expired. I can't respond.

Mr. BARTON. If you would like to respond?

Mr. BILIRAKIS. No, that is all right.

Mr. BARTON. The gentleman's time has expired. The Chair would recognize Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman. I have just been sitting here trying to imagine scuba-equipped coal miners in Florida or strip mining the Everglades. It is all very interesting.

Let me turn back to the subject of transmission that was talked about a little earlier. The administration bill gives FERC the ability to establish independent RTOs and to order utilities to turn over control of its transmission to such entities. It looks now, although I don't claim to be an authority on it, that the FERC NOPR stops short of mandating that an entity join an RTO.

Do you believe that FERC has the authority, absent Federal legislation, to order utilities to turn over transmission systems to an RTO, and can you describe for me what you think the NOPR's impact on the language included in the administration bill would be?

Mr. RICHARDSON. Congressman Sawyer, I haven't read the notice of proposed rulemaking, but what I understand that it does is that it encourages but doesn't require utilities to join regional transmission organizations. I think one of the reasons that FERC—and I would encourage you to ask the chairman of FERC this question—that they may have stopped short of requiring utilities to join regional organizations is the lack of clarity in FERC's authority to do so. Now we give FERC this authority. In addition we give authority—

Mr. SAWYER. Do you give them the authority or—

Mr. RICHARDSON. We give them the authority. And we do so also for Federal utilities, the TVAs, the PMAs, to turn over the operational control of their facilities to some of these regional transmission operators. So we do give them that clarity. The 8th Circuit Court of Appeals raised some questions about FERC's statutory authority, so we are clarifying it.

Mr. SAWYER. Is it your belief that particular format is the ideal one across the country, or is there enough diversity in the kinds of circumstances that generators and transmitters might face to provide for alternative government structures over transmission?

Mr. RICHARDSON. We are not prescribing a "one size fits all" solution. What we are saying is this should be perhaps the way we grant operational control over transmission facilities. But we recognize also that FERC can approve a TRANSCO instead. Our only concern is that a regional system or TRANSCO be independent of any operating company generation entity in a region so that you ensure that you don't manipulate some of this transmission access, so that you have full competition, so that you don't favor one generator over the other.

Mr. SAWYER. One of the biggest transmissions that we are trying to work our way through is moving from an era in which transmission lines were used for a very different purpose than we see them used for today; from the internal generating capacity of a service territory rate of return utility to the point of distribution, today being used for a vastly more complex set of demands that is only going to get more complicated.

As we face the need to grow that system, where do you see the siting authority to address questions that may not be of direct benefit to the communities through which new transmission would have to be located? Or across whole State jurisdictions, for that matter?

Mr. RICHARDSON. There has to be sufficient transmission capacity. That is No. 1.

The States have traditionally taken the lead in the siting and the approval process. I think it would be unwise to preempt the States in this activity.

Mr. SAWYER. What would you do, Mr. Secretary, in the event that we needed to get from point A to point B, and in between was State C who had no direct benefit from that, and yet it would be a geographic place against which a siting decision—

Mr. RICHARDSON. We encourage regional solutions and compacts among the States. We think that is the best way to go.

Our legislation, and this is something that I like, allows the Secretary of Energy to convene a joint meeting of the affected States to decide this issue. I am just kidding.

Mr. SAWYER. You do like those controversial things, don't you?

Mr. RICHARDSON. We think that States can resolve this on their own through regional compacts. That is what we would encourage.

Mr. BARTON. Would the gentleman yield?

Mr. SAWYER. Yes.

Mr. BARTON. Mr. Secretary, the question that Congressman Sawyer just asked, I think, is the question if we are going to get an electricity restructuring bill that works in the market. If you have A that is generating and B that is consuming and you have to cross C, and C sees no benefit, I would really encourage you to give that quite a bit of thought and speak to your experts because when we do go to markup, the transmission element of the bill—and when Congressman Dingell was here, he was expressing some concerns about this, too. That is a complex question, but in my opinion of all of the questions that we have heard in our hearings and the working group, that is the one that we still don't have a satisfactory answer for.

Mr. RICHARDSON. I think we can work something out. We recognize that a State might not have the incentive to set up a transmission line that benefits consumers in another State. However, we still think that having regional compacts would be the way to go to resolve a difficulty with that. But we will work with you on that.

Mr. SAWYER. Sort of like in low-level nuclear waste sites.

Mr. BARTON. The gentleman's time has expired. Mr. Largent to inquire.

Mr. LARGENT. Thank you, Mr. Chairman. In the administration's bill as well as the Largent-Markey bill, there is a provision that provides for a regional transmission planning organization different

from an RTO, a planning organization that specifically is charged with the responsibility of siting new generation and transmission that would address these issues that you were just talking about with Mr. Sawyer and Mr. Barton.

I want to make a couple of comments. One is that there has been some expressed reticence about why we are doing this. We have answered that question whether we should be deregulating electricity and what are the benefits. By deregulating airplanes, trains, gas transmission, telecom, we have all seen that it is the right thing to do and that there are tremendous benefits. So the question that we are trying to answer now is not whether we should or how we should, but when we should. And my hope is that it is sooner than later.

I want to get into some of the questions that the ranking member, Mr. Dingell, brought up. One of the questions: Are we not running roughshod over State legislatures? And I think the simple response is no, absolutely not. We clearly give States the opportunity to opt out, both in the administration and in the Largent-Markey bill. You don't want to compete, you show that a class of customers are going hard, and you don't have to compete. So you clearly have the opportunity to avoid competition if you want to.

And the premise and the reason why this is a more workable solution that you, Mr. Secretary, have seen and we have seen as well, is that we believe that the market works and that market pressure will force people into competition and that the government doesn't have to.

I want to get to my questions here, and that is a couple of points. One is on the grandfathering provision. I think this is an area that the administration needs to look at. Mr. Shimkus, from Illinois—the State of Illinois has moved competition in sort of a piecemeal fashion. On some of their entities they have said on a date certain, it is not until 2007, without specific language on grandfathering in your bill, you would order competition in Illinois and override the Illinois legislature, and so there are some areas that I think you need to look at that. We have addressed that in our bill and I think looking at that would be important to bring some of these States that already have gone on board.

I want to get to the renewable portfolio and the whole environmental issue. My first question is, and we have had numerous people testify before this committee, do you believe that competition, the net effect of competition—forget renewable portfolio—will be better for the environment and will be providing more reliable electric grid than we currently have?

Mr. RICHARDSON. Congressman, the answer is yes. It would be better for the environment. It would reduce greenhouse gas emissions. Let me also say to you that we would be prepared to accept your explicit grandfather clause. We have an implicit grandfather. We think that it is clear. But given what I have heard here, we would be prepared to accept the explicit grandfathering clause that is part of your bill.

The first point that you made, those organizations, those are some of the compacts that I was trying to explain. On the renewable portfolio, one of the reasons that we are stimulating the renewable portfolio is not just for conservation and clean energy and

promote energy renewables, but also some of these solar, wind, biomass, they are not what are called mature technologies yet. So what we are trying to do is stimulate them.

Was that the nature of your question?

Mr. LARGENT. No. If you want to stop right there, you will be doing good. I understand what you are saying.

The issue that I would like to raise is that I think by moving to competition, it is going to really spur a lot of innovation in a lot of areas. You are going to have more combined cycle and types of generation, even using fossil fuels, gas, coal, there will be cleaner and more efficient generation of electricity as a result of going to competition that will be better for the environment.

My question is—and we have not figured this out either—how do we incentivize that type of innovation that may not be renewable; it may be gas or coal, but the net effect is that it is very positive for the environment?

Mr. RICHARDSON. We agree. We think that our bill and your bill gives better incentives for better fuel use, greater opportunities to market green power and competitive markets. We talked about renewable portfolio standards. The Public Benefits Fund promotes conservation, and both of our bills contain measures to remove barriers to stimulate combined heat and power and distributed power technologies that are very conducive to the goals that you and I have.

I would urge you, Congressman, to consider in your bill to raise the renewable portfolio from 3 to 7.5. That would be my only constructive suggestion.

I think there will be some members of this subcommittee, but certainly of the full committee, that will be wanting to get into the Clean Air Act on the electricity bill. Is it your position that opening up that can of worms will be a poison pill for ever getting an electricity restructuring bill?

Mr. RICHARDSON. Yes, it would be a poison pill.

Mr. LARGENT. Thank you.

Mr. WHITFIELD [presiding]. We are going to have a series of votes coming up.

What I would like to propose and do, Mr. Rush, if you would like to proceed with your questions and then when you finish, we will adjourn until 12:45.

Mr. RUSH. Thank you, Mr. Chairman. I really appreciate your recognizing me.

Let me just say, Mr. Secretary, I am heartened by your expressed comments regarding accepting Largent-Markey's explicit language on grandfathering. It means a lot to me, as I do represent a district in Illinois.

The administration's legislation allows electric co-ops, munis and States to opt out of electricity restructuring if they can show after notice and hearing that retail competition will have a negative impact upon a class of customers that cannot be reasonably mitigated.

Can you further elaborate? And I think you started with the questions and your answer to the questions from Mr. Bilirakis, but what is exactly meant by negative impact that cannot be reasonably mitigated?

Mr. RICHARDSON. We probably should have clarified that language. It basically means that we are trying to preclude consumer rates and pricing from going up.

Mr. RUSH. Preclude them from going up?

Mr. RICHARDSON. Yes.

Mr. RUSH. You also indicated that the administration's bill would subject the transmission lines of all utilities, including those owned by cooperatives and municipal utilities, to FERC jurisdiction. The stated purpose is to ensure greater competition. That said, it is often the case that cooperatives own very few miles of transmission lines but, under the bill, would be subject to FERC order 888 and its tariff-filing requirements.

It seems that by subjecting cooperatives that own so few miles of transmission lines to tariff-filing requirements will be overly burdensome and may put cooperatives at a distinct disadvantage. Could you explain how competition would be compromised if cooperatives that own few miles of transmission lines are exempted from the tariff filing requirement?

Mr. RICHARDSON. Congressman, we want to make sure that co-op facilities are treated fairly. We think that this bill does. We recognize that some of the small co-ops don't own some of the interstate transmission lines as defined by FERC; and, therefore, those that don't own those transmission lines would not be subject to FERC competition.

Those co-ops that do own transmission facilities, we think that they should not be treated differently than other transmission owners. However, let me just say that FERC can exempt those co-ops and other utilities which only own small amounts of transmission which are considered not essential to competitive markets.

So I know how deeply you care about some of those co-ops, especially in an urban area, but we believe that the bill is fair to them. Basically the smaller ones have a protection and that is what we are trying to do.

Mr. RUSH. Have you developed cost burdens, projected cost burdens, on smaller municipal and cooperatives under your bill?

Mr. RICHARDSON. Congressman, we have broken it up by customers, not by utilities, but I have got my—if you want to hear, I have an expert.

Mr. RUSH. We don't have enough time. Will you get that to me?

Mr. RICHARDSON. I will.

[The following was received for the record:]

The vast majority of smaller municipals and cooperatives do not own transmission facilities and would therefore bear no cost burden under our proposal. We believe that FERC already has authority to exempt utilities that have small amounts of transmission which are not considered essential to competitive markets, and we would expect FERC to provide such exemptions. We would also support an explicit clarification of FERC authority to provide such exemptions. Given the above, we envision virtually no cost burden for smaller municipal and cooperative utilities.

Mr. RUSH. Thank you. Mr. Chairman, I yield back the balance of my time.

Mr. BARTON. Mr. Secretary, we are going to give you a personal convenience break. The committee is in recess until 12:45.

[Brief recess.]

Mr. STEARNS [presiding]. The Subcommittee on Energy and Power will reconvene. The chairman has asked me as vice chair-



man to start at 12:45; he will return at 1. And we also want to thank the Secretary for his patience. I understand that he would like to leave at 1:15 or thereabouts. So without further ado, we will continue our questions with Mr. Shimkus recognized for 5 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman. Mr. Secretary, I will get right to brass tacks on some of these questions. One response that we need to understand about the Midwest power spikes is that it did send a market signal out to industry, and this year there is increased generation. So that unique event, the market has responded by creating new generation in the Midwest and has eased a lot of the tensions that many of us were fearful we would see again this year.

On your testimony on page 10, you list a concern for rural co-ops and I was interested in hearing my colleague, Bobby Rush from Illinois, and the fact regarding New York City and the urban co-ops that are forming. This was addressed in the meeting that we had on Tuesday.

I think you all are saying that you don't see regulation of the smaller co-ops. In Mr. Rush's case, that would be with very little transmission lines or none, in essence.

In my area there are rural co-ops who are at the end of the line, and I think we are going to be looking for some maybe stronger language that says we are not going to regulate the rural co-ops that have no—that are not in the major transmission grid, they are at the end of the lines or bounded. Can you expand on your position a little more?

Mr. RICHARDSON. Yes. Congressman, we would prefer to give FERC that flexibility and I think we have given the rural co-ops—and we want them to be happy with this bill. I had a meeting with our former colleague, Glenn English; we want them as part of this bill to feel that not only are they protected but they can flourish. We first have that rural safety net which we have calculated based on national wire charges of up to 1.7 mills kilowatt per hour would be available if I determine that competition has adversely impacted rural consumers.

What I told Mr. Rush is that we want to give FERC this ability to make those decisions, but what we have is a differentiation between the small distribution cooperative utilities that own lines as defined by FERC and the ones that don't. So we believe that co-ops that do own transmission facilities should not be treated differently than other transmission owners. So we are trying to say to the co-ops that we want to be protective of their objectives.

Mr. SHIMKUS. But obviously based upon my question, they don't have that surety, and I guess the more precise question would be is there anywhere that there is exemption of co-ops with de minimis transmission? And I think that is something that has to be addressed.

Mr. RICHARDSON. We don't have a specific exemption but FERC has that authority. And I think FERC has enough guidelines and enough sense to recognize that rural co-ops that may not be positioned properly deserve some type of protection.

Mr. SHIMKUS. And where do you think FERC has that authority stated now?

Mr. RICHARDSON. I am told that it is order 888 that gives them this existing authority.

Mr. SHIMKUS. I am being told 888 does not refer to distribution co-ops.

Mr. RICHARDSON. What this does is, this is a clause that gives FERC authority on some of these distribution clauses. That is my understanding.

Mr. SHIMKUS. So maybe we need to work in the working groups to try to—

Mr. RICHARDSON. I want to work with you on the rural co-ops. I know that they are important. They are essential. I think we can do that.

Now, I do think that they will benefit from competition. I think there may be a little bit of concern that they won't, but I do think that they can.

Mr. SHIMKUS. I agree with you, too. I am a big proponent, and I think eventually they will see the great benefits. And I know that Mr. Largent mentioned Illinois—and I guess my biggest concern, and the chairman would be really upset if I didn't trumpet the horn for the State bills, the grandfathering—and of particular interest to Illinois is the severability clause that is in our language, and we have to be very careful that if—and I am having this fight with the chairman—that if there is something in the Federal language that changes the Illinois bill, the Illinois bill by definition tumbles down and they have to restart the process. And we want to make sure that does not happen.

Mr. RICHARDSON. Congressman, on the first issue, you may not have been here, and I know that you have talked to me about this, I have agreed to a specific grandfathering clause, an explicit. Ours was implicit. And I know your State and I applaud your State. I talked to your Governor about it. This is a very good bill and we are ready to say that we accept an explicit grandfather.

Mr. SHIMKUS. God bless America. Thank you.

Mr. STEARNS. The gentleman's time has expired. The Chair recognizes Mr. Burr for 5 minutes.

Mr. BURR. Thank you. Has DOE met with Wall Street to get their response to your bill?

Mr. RICHARDSON. I have had meetings with Wall Street people, yes.

Mr. BURR. Did they feel that your bill would generate a flight of capital to this industry?

Mr. RICHARDSON. Yes, I think they felt that this is a bill that has potential to generate capital, to give them investment opportunities. I addressed a Wall Street group, I think it was about 3 weeks ago, and the response that I got was quite positive.

Mr. BURR. The working group, I think, is going to do the same. Does the administration's bill increase or decrease Federal regulation?

Mr. RICHARDSON. Well, we decrease Federal regulation. We consider our bill—this is a discussion I had with Congressman Dingell. We think that we restructure rather than deregulate. We are not adding more regulations. What we are doing is we are moving ahead with reducing Federal impediments to promote competition. I would say that is the basic objective of the bill.

Mr. BURR. Let's suppose for a second that a co-op chooses to opt out under your opt-out provision.

Mr. RICHARDSON. Right.

Mr. BURR. Let me ask you, would they still be required to meet DOE, FERC, EPA, FTC rules on retail consumer information disclosure of rates and terms found in your bill?

Mr. RICHARDSON. Yes, they would.

Mr. BURR. Would they be under the DOE and FTC subpoena and enforcement authority covering retail data, notwithstanding jurisdictional limitations of the FTC Act?

Mr. RICHARDSON. Yes.

Mr. BURR. FTC rules barring slamming and cramming?

Mr. RICHARDSON. Yes.

Mr. BURR. DOE residential electric consumer data base and related DOE power to request any appropriate information?

Mr. RICHARDSON. Yes.

Mr. BURR. From electric retail suppliers, \$3 billion in Federal tax generation to the public fund?

Mr. RICHARDSON. Yes.

Mr. BURR. Even if they opted out, they would have to pay?

Mr. RICHARDSON. Yes.

Mr. BURR. Federal limitations on State retail wire charges for public benefits?

Mr. RICHARDSON. Yes.

Mr. BURR. 7.5 percent renewable standards?

Mr. RICHARDSON. Right.

Mr. BURR. Even if they opted out, the local grid net metering?

Mr. RICHARDSON. That is right.

Mr. BURR. Local interconnection rules?

Mr. RICHARDSON. Yes.

Mr. BURR. Retail market competition effects?

Mr. RICHARDSON. Yes.

Mr. BURR. The FERC advanced review over generation-only mergers, they would actually expand FERC's merger from generation to generation only?

Mr. RICHARDSON. That is correct.

Mr. BURR. It would give FERC the authority to order an end to ISO entities?

Mr. RICHARDSON. Yes.

Mr. BURR. It would give the authority to regulate co-ops or munis under the system?

Mr. RICHARDSON. Yes. And our objective there is to promote wholesale competition.

Mr. BURR. It would also increase DOE's authority over worker safety which is already covered under OSHA, wouldn't it?

Mr. RICHARDSON. I don't believe we do. What we talk about in the bill is model codes, but I don't believe we over take OSHA's jurisdiction.

Mr. BURR. As you and I both know, we are both headed to the same place, and that is a bill.

I think we attempt to get there in a little bit different way. Let me ask you just one last thing. Define market power for me? I have heard everybody in the world use it.

Mr. RICHARDSON. Market power.

Mr. BURR. Because we are proposing that market power will be regulated by FERC. And to my knowledge there is no current Federal agency that regulates market power.

Mr. RICHARDSON. The ability to control a price in a volatile market.

Mr. BURR. But your bill extends the jurisdiction, I think, to FERC to force divestiture when they have determined that market powers exists to a degree that is threatening, without market powers or threatening being defined?

Mr. RICHARDSON. I think the objective here, Congressman, is to give FERC the ability and the authority to prevent utilities from abusing their market power in a manner that manipulates prices in a specific region. Additionally, FERC's authority over mergers would be extended to mergers between holding companies and FERC to—we would want to look at the impact of a merger on retail competition.

Mr. BURR. So through the administration's bill, do we increase regulation or decrease regulation?

Mr. RICHARDSON. I think we decrease regulation, but there has to be a role for a Federal entity that not only is reducing regulation, getting statutes that promote retail competition, but I think there has to be some oversight, and I think you and I can work together to deal with that. But FERC has been a good agency. It is active. It has a new chairman.

Mr. BURR. I think the first thing that Wall Street would tell me and you and every member, if all we do is reregulate or increase regulation, we create new things for FERC, and capital will not see this as a great opportunity. So I look forward to working with you, as you well know, to try to make sure, because in the end my final test is how does capital respond to what we do.

Mr. RICHARDSON. And I think your objective and mine are the same, to develop competition, and we are heading in very much the same direction.

Mr. BURR. Are the co-ops on board with the administration's plan?

Mr. RICHARDSON. I can't speak for them. I would sense they are moving in our direction. But they still have some provisions that they want clarified. But in general, I think they are supportive. They are fearful of some types of competition, especially from some of the bigger utilities. And we are ready to work with them. I represented many co-ops over many years, and I think they are very much moving in our direction. And I think competition is good for them. And this is something that I believe will make them stronger.

Mr. BURR. As you know, there is a proposal on the table for no date certain, but a firm use of reciprocity. Do you see that personally as an effective tool or does it not create the incentive that you have talked about earlier?

Mr. RICHARDSON. I think, Congressman, I think we need both. I think you need a date certain and you need reciprocity. You need a date certain because you want to be able to have language and timeframes so that competition is stimulated. But we are ready to work with you on both of those.

Mr. BURR. I would ask the chairman for unanimous consent if we have additional questions that we could include those into the record.

Mr. BARTON. Without objection.

That completes the first round. We are going to kind of a general free-for-all. Congressman Hall has some questions and I have questions, and Mr. Whitfield. You have to leave at 1:15; is that correct?

Mr. RICHARDSON. Yes.

Mr. BARTON. Let me ask the first question and then other members that wish to, just join in.

The electricity bill that you sent to the Congress was actually two bills. You have an authorization bill and you have a tax bill. We don't have jurisdiction on tax issues, so do you view the combination of the two bills as inextricably linked? And, if so, what do we need to do with the Ways and Means Committee?

Mr. RICHARDSON. Well, we need to obviously respect the jurisdiction of the Ways and Means Committee, but we think that the policy is set by this committee and we think that it is essential that the policy framework that we are seeking be first approved by this committee.

You are right, Mr. Chairman, we need to work with the Ways and Means Committee. We have gotten generally good responses from them, but my sense is that everybody is looking to you to move because you are the main policy committee that has to deal with it.

Mr. BARTON. Your bill, the administration bill also has a Public Benefits Fund provision in it, and quite honestly, talking to members on both sides of the aisle, I don't see a lot of support for that in a national bill. Every State that has legislatively done something has included a Public Benefits Fund in their State legislation, and in most States they have increased the amount of money going into that fund. Given that fact, don't you think that that lessens the necessity of including a Public Benefits Fund provision at the Federal level?

Mr. RICHARDSON. Here is our concern, Congressman. We think that with the advent of competition, that utilities might not be willing to recover these costs from their customers. Therefore, we think that it makes sense—this is a very modest amount. And the goals are noble. It helps low-income persons pay for their bills. It promotes renewable energy.

Mr. BARTON. We know all of the good things that it proposes to do, Mr. Secretary. But do you know of any State that is active that hasn't included a Public Benefits Fund? We are not aware at the committee level that the States haven't done exactly what you are wanting them to do.

Mr. RICHARDSON. But I think the worry is that the utilities will not take these steps when competition takes place.

Mr. BARTON. But do you agree that the States have taken care of the problem?

Mr. RICHARDSON. I will provide you a breakdown, but I think some States have transitioned these Public Benefit Funds and are ending them. This is what worries us. We think that there should be this safety net.

[The following was received for the record:]

Information on recent trends in spending for two types of public purpose programs (demand-side management/energy efficiency and low-income assistance) is readily available.

Data collected by the Energy Information Administration indicates that total utility expenditures on demand-side management fell by 50 percent between 1994 and 1998. The American Council for an Energy Efficient Economy has also compared peak spending for demand-side management programs to State public benefits funding in the fourteen States that have decided on public benefit fund amounts for energy efficiency. Comparing 1993 actual spending amounts to average public benefits fund amounts in these States, the average net change is a decline in spending of \$61 million/year. Eight States increased funding over 1993 levels while 6 States decreased funding.

With respect to low-income assistance, a July 1997 report by Oak Ridge National Laboratory, *Low-Income Energy Assistance in a Restructuring Electricity Industry: An Assessment of Federal Options* (ORNL/CON-443), reviewed national spending on low-income energy assistance. The report estimates that support for low-income electricity services in 1996 was between \$400 and \$600 million with a Federal contribution of roughly \$300 million. Total low-income energy assistance for all fuels, including oil and natural gas used for heating, was \$1.8 billion. A review of state-level information suggests that during the transition to restructured electricity markets, States have generally provided for low-income assistance at levels roughly comparable to those provided prior to restructuring, during the transition to restructured electricity markets.

Two additional points applicable to all types of public purpose programs are important. First, public benefit funds at the State level are typically established for a limited period, usually 3 to 5 years. The program offered in the Administration proposal would encourage States to continue their programs in order to qualify for the matching funds. Second, while many States have acted, most have not yet restructured or have yet to determine funding mechanisms and levels for public purpose programs. The national public benefits fund offers an incentive for these States to provide public purpose programs.

Mr. BARTON. I am just asking questions because I wanted to get the ball rolling. Mr. Shimkus, did you have a question?

Mr. SHIMKUS. Of course, Illinois does have a very strong one. Of the 22 States, these are new legislation. This is all new legislation, so I didn't understand the comment that you are fearing that they are ending when—these are all new pieces of legislation that are dealing with deregulation.

Mr. RICHARDSON. Well, I think the worry, some of the States that have passed competition bills only have it for a few years so they are ending them. This is what worries us. We think that there should be a little pot there. It is not that big and it is not going to hurt the utilities. We think that it is money that comes back in many other good forms.

Mr. SHIMKUS. I would yield back but that is not my question, Mr. Chairman.

Mr. BARTON. Mr. Hall?

Mr. HALL. I have been away and I don't know if this has been asked, I know that you are aware for the last 30 years the United States and Canada have been electrically divided into so-called reliability regions, and one of these regions is called the Electric Reliability Council of Texas called ERCOT. You have heard that every time that we have been here, and it is completely contained within the State of Texas.

All transmission owners within ERCOT are already regulated by the Public Utility Commission of Texas or by FERC, and that is for purposes of open access, transmission service; and by State law, utility commission rules for open access have to be consistent with FERC open access regulations.

While I understand the need for FERC to extend the jurisdiction for major transmission owners across the U.S. to close any gaps—there might be a jurisdictional gap in an open access area—wouldn't you agree that there are no jurisdictional gaps to be filled within ERCOT within the State of Texas? If there are, I am not aware of them.

Mr. RICHARDSON. I think, Congressman, I want to work with you on that. We know the unique status of Texas on this and many other aspects, and we want to work with you. We have the North America Reliability Council, which we think that concept works well. I will tell you, though, I just met with a number of western Governors of western States who wanted to make sure that their input into this bill and this future transmission process is taken into account, and we will do that. If I can work with you to see how we can deal with the unique status of—

Mr. BARTON. Would the gentleman yield?

Mr. HALL. Yes.

Mr. BARTON. Do you know who the current chairman of the NERC is?

Mr. RICHARDSON. He is a Texas guy.

Mr. BARTON. Yes, Erle Nye of Texas. So Texas is part of NERC, and we will be very happy for ERCOT to continue to work within the NERC framework.

Mr. HALL. And Erle Nye has indicated a willingness to meet with you any time to advise you on this.

Mr. BARTON. And you do know that Congressman Hall is from Texas. You do know that the chairman of this subcommittee is from Texas, so you know that we are going to be very concerned when we look at things in Texas.

Mr. HALL. I sat right by and supported the gentleman from the West for 12 years.

Let me ask you to accept the fact that—a little more Texas bragging here—the first operational independent system operator ISO, as they are commonly called, in the country was the ERCOT ISO. If you accept all of these, I have a question that I want to ask you. The ISO was formed by ERCOT market participants at the direction of the utility commission, and the ISO ensures fairness and governance with a balanced stakeholder board, using a Democratic one-person, one-vote system. Since ERCOT already has the major attributes FERC is looking for nationwide—and don't tell him to disagree with me, we set your pay, you know, he doesn't. Since ERCOT has already had the major attributes that FERC is looking for nationwide, reasonable rates and a working ISO that generally meets FERC's transmission organizational principle, what can FERC jurisdiction possibly add to it?

Mr. RICHARDSON. Well, Mr. Ranking Member, we do give FERC that flexibility. We got into this discussion with Congressman Burr. I just think that you have to have some oversight. You have to have some standards and I think that is what we are trying to do.

Mr. HALL. Well, I must say that you have been very reasonable and available for us to talk to and negotiate with.

Mr. BARTON. Would the gentleman yield?

Mr. HALL. Sure.

Mr. BARTON. We had this same discussion on Tuesday in our working group with Chairman Hoecker and Commissioner Hebert of the FERC, and the way I put it to them, as long as the State conforms with to give the FERC the authority to set the guidelines, and then you have to require conformity, the bottom line is to make sure that there is oversight.

Mr. HALL. Anybody not satisfied, Mr. Chairman, has recourse to FERC.

Mr. BARTON. So it is not a question of either/or; it is a question that you set the rules. But if you wanted State PUC, if it is totally intrastate, they should have that authority. Do you have a problem with that?

Mr. RICHARDSON. Well, you know, we give FERC that authority, but that is something that we can discuss, given the dramatic interest of Texas in this process.

Mr. BARTON. The gentleman from North Carolina, Mr. Burr, and then the gentleman from Illinois, Mr. Shimkus.

Mr. BURR. Thank you, Mr. Chairman.

Mr. Secretary, Chairman Hoecker also made a statement at this subcommittee. He said that FERC would be unable to ensure the availability of open access transmission unless electric co-ops, along with other utilities, became subject to agency jurisdictions under order 888.

Let me ask you, given that that is clearly the sign of the direction the FERC wants to go is to cover everybody under 888, I am concerned in your bill with the expansion of their control for transmission, that a distribution co-op that generates their power and then gets that power to their distribution network to distribute to their retail customers, would in fact have to file under a transmission company if they met the—

Mr. RICHARDSON. Well, Congressman, it would not if it had interstate transmission facilities. If it didn't, that is the differentiation. We basically try to differentiate between the larger and the smaller, the more powerful and the less powerful.

Mr. BURR. It is based on the amount of kilowatts moved over that transmission, and given the fact that they are rural, the likelihood is that we have a number of co-ops who would have to, one, pay a \$25,000 filing fee, would come under all of the rate and tariff reporting and review of FERC, where they are currently regulated by FERC for open access, but don't fall under any of these specific requirements.

Mr. RICHARDSON. We don't think that these are very burdensome requirements. Now again, we want them to feel that by entering into this competition market, that they will get a chance to get more customers. Their prices are competitive, their technology is competitive.

Mr. BURR. As you and I both know, co-ops today utilize for their lowest generated power hydro. It is not included in the 7.5 renewable requirement that they would fall under even if they opt out. And I guess one has to figure, are the co-ops actually going to see an increase or a decrease in what they are able to pass on to their customers?

Mr. RICHARDSON. I think they will do well. Now, on the hydro issue, I think we have discussed this before. Hydro is clean, it is



efficient, it is also a mature technology. It is not a technology that we felt was in the same category as others that still need a little help and more technology, that haven't access to as much commercialization. That is why we did not include it.

Mr. BARTON. The gentleman from Illinois.

Mr. SHIMKUS. I know when you were a member here, you signed letters in support of bio-diesel. My question is simple. Does your definition of biomass include bio-diesel? And for the agricultural ravaged sector of the United States, it ought to consider soybeans and corn.

Mr. BARTON. He wouldn't show me that question, Mr. Secretary. He hid it from me.

Mr. RICHARDSON. I remember signing a letter about bio-diesel.

Mr. SHIMKUS. Yes, it helped me pass that legislation last year. I appreciate that.

Mr. RICHARDSON. Therefore that is our policy; it is included, bio-diesel.

Mr. SHIMKUS. Amen.

Mr. BARTON. What does that have to do with electricity restructuring? Does any other member wish to ask a question. Mr. Shadegg, do you wish to ask questions?

Mr. SHADEGG. I pass.

Mr. BARTON. Mr. Secretary, we will have other questions for the record. I have three or four, but you said that you wanted to leave by 1:15.

We are very serious about drafting a comprehensive bipartisan bill, and we want to thank you for your strong leadership and support on this issue and for appearing before our subcommittee. We will be in contact very soon.

Mr. RICHARDSON. Thank you very much.

Mr. BARTON. This hearing is adjourned.

[Whereupon, at 1:20 p.m., the subcommittee was adjourned.]

## ELECTRIC RESTRUCTURING LEGISLATION

THURSDAY, JULY 22, 1999

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON COMMERCE,  
SUBCOMMITTEE ON ENERGY AND POWER,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 11 a.m., in room 2123, Rayburn House Office Building, Hon. Joe Barton (chairman) presiding.

Members present: Representatives Barton, Stearns, Largent, Burr, Norwood, Shimkus, Bryant, Ehrlich, Bliley (ex officio), Hall, McCarthy, Sawyer, Markey, Pallone, Brown, Rush, Wynn, and Dingell (ex officio).

Staff present: Cathy Van Way, majority counsel; Jeff Krilla, majority counsel; Joe Kelliher, majority counsel; Curry Hagerty, majority counsel; Ramsen Betfarhad, majority counsel; Donn Salvosa, legislative clerk; Sue Sheridan, minority counsel; and Rick Kessler, minority professional staff.

Mr. BARTON. The subcommittee will please come to order. We have a large number of witnesses today. We have a fairly significant number of bills to review. The Chair is going to ask unanimous consent that his written statement be put into the record. I am going to dispense with the reading of it in the interest of time. [The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, SUBCOMMITTEE ON ENERGY AND POWER

I'd like to welcome everyone to today's hearing in which we examine electricity restructuring bills which have been introduced in the 106th Congress and referred to this Subcommittee.

When I took the helm of this Subcommittee at the beginning of this Congress, one of the goals we set for this Subcommittee was to pass comprehensive Federal electricity legislation that lowers electric prices for consumers by promoting competition in retail markets. Towards this end, today we are going to examine a number of bills which have been introduced to restructure the electricity industry in this country. There are many elements common to each of these bills: promoting retail competition, assuring consumer protection and clarifying federal and state authority as well as the scope of what Federal legislation should be with respect to reliability and transmission.

Now that I have had a chance to study many of these bills more closely, I am heartened to see that we agree on many of the same goals, although in some cases we disagree on the means of getting there. But in general, there are more issues of consensus than not, which gives me great hope that a comprehensive electricity bill can be reported out of this panel with large support. Surely we won't all agree on every point, but the wide range of members who see comprehensive restructuring legislation as a positive and inevitable trend is encouraging.

For anyone who hasn't seen the writing on the wall and still believes they can avoid competition, I have a message for you: its too late. Don't waste your time and energy trying to stop it and instead join in on the effort. Competition is coming. It's

been proven over and over again competition leads to lower prices, improved customer service, and greater innovation. Federal and State legislators and regulators alike recognize that market forces and customer choice—not monopoly control and government regulation—should determine the prices that consumers pay for electric service. All we are doing now is working out the details and I invite everyone to constructively engage in the process.

I believe there is a Federal role in assuring that utility competition benefits all consumers and electric utility restructuring saves American consumers \$20 billion annually, and I am going to endeavor to pass a bill as expeditiously as possible.

In this hearing I look forward to listening to the interests represented here today and work towards a restructured electricity markets.

Mr. BARTON. I welcome everybody to the hearing.

This is a review of several bills that have already been introduced on electricity restructuring. We hope in the very near future to have a comprehensive bill that this subcommittee introduces on a bipartisan basis. We will hold a number of legislative hearings on that particular bill.

Before we do that, we want to take a look at H.R. 667, the Power Bill; H.R. 971, the Electric Power Consumer Rate Relief Act; H.R. 1138, the Ratepayer Protection Act; H.R. 1486, the Power Marketing Administration Reform Act; H.R. 1587, the Electric Energy Empowerment Act; H.R. 1828, the Comprehensive Electricity Competition Act; H.R. 2050, the Electric Consumer's Power To Choose Act of 1999; and H.R. 2363, the Public Utility Holding Company Act.

I would like to recognize either Mr. Hall or Mr. Brown for an opening statement. Mr. Hall, would you like to be recognized?

Mr. HALL. Defer to Mr. Brown.

Mr. BARTON. We will defer to Mr. Sherrod Brown of the great State of Ohio for what, I hope, is a brief opening statement.

Mr. BROWN. It is pretty brief, Mr. Chairman. Thank you and I thank both the gentlemen from Texas for the time. I will be introducing in the next week or 2, Mr. Chairman, the Community Choice For Electricity Act. The bill would ensure that individual electric consumers can aggregate, can join together to form buying groups to obtain better electricity rates and services than they could on their own.

The legislation would apply only to States in which retail competition for electricity is already in effect. It would neither encourage nor discourage electric utility deregulation at the State or the Federal level. In addition to encouraging aggregation generally, this bill would give local governments the option to pursue a particular type of aggregation known as community choice.

Through a City Council vote or a referendum, citizens could decide that their local government will negotiate an electricity contract for all consumers within the boundaries of the community. Participation is completely voluntary. Cities, towns, or counties must pro-actively decide to exercise community choice.

Consumers in those communities who prefer to select their own electricity suppliers can opt-out with no penalty. Communities can join together and form larger buying groups. Electric utilities would continue to own and maintain the polls. In this type of aggregation, residents and small business consumers will be able to obtain lower electricity rates.

Communities could also negotiate with electricity suppliers to include renewable energy generation, energy efficiency services, and

programs to assist low-income customers. Community choice can relieve customers of the difficulty of evaluating competing offers from electricity suppliers, and the annoyance of responding to telemarketers; something with which we are all too familiar in the telecommunications industry.

For an electricity supplier, a local government can provide a balanced electric load. Again, Mr. Chairman, this is all voluntary. Communities would need to make a decision to exercise community choice for electricity. The individual consumers who want to make their own choices would always be free to opt-out.

I ask my colleagues to consider these ideas as you review the range of proposals for changes in the electricity sector in this hearing today, and in subsequent hearings and markups.

Mr. Chairman, I thank you for your time. Mr. Hall, I thank you for yielding.

Mr. BARTON. Thank you, Congressman Brown. We recognize the distinguished ranking member of the full committee, Mr. Dingell for an opening statement.

Mr. DINGELL. Mr. Chairman, I thank you. My remarks will be brief this morning. I am sure that will please you greatly. This is an appropriate and convenient time to hold the legislative hearings on the sundry bills pending before the House, which would relate to electric restructuring.

The breadth of these proposals underscores the complexity of the issues. The witness list indicated to me that a number of parties with keen interests and the committee's will be heard. It should be noted as well that this is the first hearing since Chairman Bliley and you, Mr. Chairman, released an outline of your joint legislative proposal.

Since this proposal appears to reflect concepts embodied in the bills' notice for this morning's hearings, I believe that the testimony today will be timely. I understand that you, Mr. Chairman, also plan to hold separate hearings on the legislative language for your proposal, and also for Chairman Bliley's joint proposal. I believe that is a good idea.

If the goal of the legislation is to achieve something other than mandating competition, the question remains, should the Congress enact restructuring legislation and for what purpose? We might also ask when?

Indeed the question why is not an inappropriate one. Is the goal to provide federally managed competition for this industry, to redirect, or to direct competitive forces set free by the States? Are we in the business then of directing the States to take particular action?

Does this mean that FERC will achieve what appears to be their ambition, to play the role of manager? I note that a number of FERC's proposals would confer upon them a number of new authorities, some of which would be cataloged as being clarifications of authorities, which they do not have; a very interesting thought I would observe to you.

The question before us can also be should a State jurisdiction of their transmission system be preempted then in order to clarify Federal-State jurisdiction which seems to be quite clear at this

time? If so, how would this work in States which choose not to adopt rate competition for the foreseeable future?

Of course, the question again remains at what cost would such Federal reforms be secured as events played out in the political arena and other legislative issues come to the fore? One of the curious things I think we should ask is just how much do we want to load this legislation with new green proposals?

How many of our environmental laws do we wish to amend, expand, or change? In any event, Mr. Chairman, I commend you. I am please to see the committee begin legislative hearings. This should help the members get their bearings on the issues. Perhaps we can consider matters, other than mandates, and better assess the need for time limits, and the prospects for moving legislation in the near-term, or whether we ought not move any legislation at all until such time as the States have carried out their proper responsibilities.

In any event, Mr. Chairman, I thank you. I look forward to the testimony this morning.

Mr. BARTON. We thank you, Congressman Dingell. I think your questions that you illucidate in your opening statement are, as you put it, also very timely. I think those are the questions we need to take a look at.

The gentleman from Illinois, Mr. Shimkus is recognized for an opening statement.

Mr. SHIMKUS. Thank you, Mr. Chairman. It is a pleasure to be here and at this hearing, as we come to a culmination, I think, of a lot of stuff that we have been working on for at least the 2½ years that I have been a Member of Congress, and really fevently, this Congress, with the working group.

I am very interested in hearing the testimony from the witnesses on the multitude of bills that have been introduced. I am going to focus on comments that deal with market power, consumer protection; particularly, since my State addressed these issues in its statute or by Commission's ruling.

I hope to try to glean from this whether Federal regulation is needed or will it create a duplication? In that duplication, will it hinder competitiveness? Of course, everyone knows my position is ensuring that no harm is done to especially the bill. I look forward to these hearings and the process as we move forward. I commend the chairman for his great leadership. I think there are exciting times ahead. I yield back my time.

Mr. BARTON. We thank you.

What thank you. The gentleman from Texas, Mr. Hall, is recognized for an opening statement.

Mr. HALL. Mr. Chairman, thank you. We are moving into the next phase, maybe in one of the, not the last phase, but a very important phase of consideration of our electricity legislation with this hearing here today. While we have had other legislative hearings earlier on the administration's bill, I think this is the first one that the witnesses have really gotten down to the nitty-gritty.

Thank you for submitting your statements ahead of time to where we could read it. The chairman would get after you if you did not do that. You have done it. We have read them. I think you have addressed the specific legislative language in the specific bills.

I am glad to see Glenn English, who was a long-time Member of this Congress; always known as a work horse and not a show horse. He is pretty enough to be a show horse, but he chose to by-golly do the work. I want to thank all of the witnesses that are here today. The quality of your testimony is, I think, extraordinarily high, extraordinarily helpful, and extraordinarily thoughtful.

For you, I thank you for that and I am sure the chairman does. Of course, what we have missing from us today is the one bill that is yet to emerge. That is Mr. Bliley's bill. We are all anxious to see, on this side, are anxious to see that bill. The outline released last week has given us a slight peek at what it is going to contain. We are grateful for that. The subcommittee chairman, Mr. Barton, has really worked tirelessly to open the bill development and drafting process. He has assigned to both Democrats and Republicans positions on committees.

He has brought in everyone from the administration, Bill Richardson and others knowledgeable and gleaned, I think from just about everybody he can, information with which I hope we are going to be able to write a bill. Joe, I appreciate your efforts to work on this bill, and to work in a collaborative basis as you work with Chairman Bliley to develop the best bill that you all think can be developed over there.

I think your approach is the best way to seek consensus. I like your questionnaire that you sent out. I hope that you and your group will really read the answers to that questionnaire as you come up with a bill to submit over here; a bill that we hope we can help you with and work with you on.

In the time remaining, I want to recognize a couple of Texans, if you do not mind, who are appearing before us today. They are not any of your kin folks. We usually have some of your family out there.

Mr. BARTON. We did not sob the audience today.

Mr. HALL. We got to have a hearing in Ennis, Texas some of these times.

Mr. BARTON. My sister is in town. She is not in the audience today.

Mr. HALL. If you have a picture of her—

On first panel, welcome to Steve Kean, who is with Enron of Houston; a friend of ours. On the second panel it is good to see Dick Brooks, who is Chairman of Central and Southwest Corporation. I might add, welcome to Marty Kanner, who is proud to say he was born in Houston, Texas. So, we are glad to have you here today and look forward to getting your insights and wisdom on the task we are faced.

What that, Mr. Chairman, I yield back my time. I thank you.

Mr. BARTON. Thank you, Mr. Hall. We did invite a constituent of full committee Chairman Bliley's, so that we have him covered, and that is Ms. Price-Davis. She is from Richmond. So, we do not have any of my relatives, but we do have the chairman's constituents. That is probably even better, I think, for progress. I will bet she is going to give us some good information when we get to that point.

The distinguished vice chairman of the subcommittee, Mr. Stearns, who has a bill that we are reviewing today.

Mr. STEARNS. Thank you, Mr. Chairman. Perhaps we want to give the floor to Mr. Hall again. He has done such a great job here this morning. I, of course, want to thank you, with my colleagues, for holding this hearing.

The issue before us today, and of course the past several years, is one that affects every constituent in everyone's district. So, I think we must be mindful of the decisions we make in this subcommittee, which will affect all businesses across this country. It is for this reason that we should continue the pragmatic, thoughtful, and inclusive approach that Chairman Barton, Mr. Hall, Mr. Pickering, and Mr. Sawyer have sought in addressing this complex issue.

We have before us a number of bills designed, in one way or the other, to regulate this industry. In looking at these bills, I believe there is some consensus among all of the bills. Mr. Chairman, I thought I might just take a crack at outlining the consensus here. Repeal of PURPA, and providing for PURPA-mandated cost recovery is one.

Repeal of PUHCA. Application of FERC authority over non-jurisdictional entities, including Federal utilities, ensuring reliability as proposed by NERC consensus language, authority for States to order retail competition. Last, of course, to encourage competition through State reciprocity. So, there are number areas that almost all of the bills agree upon.

Of course, there are a number of issues that remain that we must address. I am sure with this panel, with these witnesses, we will be able to talk about them. So, I look forward to the continuation of this hearing and others, Mr. Chairman, as well as what my colleagues will offer in the ensuring discussion. Thank you.

Mr. BARTON. Thank you, Congressman Stearns.

We would now like to hear from Congressman Pallone, who has also introduced a bill. We do not have it on our agenda because it was not introduced on the date that we noticed this hearing, but he did introduce a very comprehensive bill earlier this week, I believe. I recognize Mr. Pallone for an opening statement.

Mr. PALLONE. Thank you, Mr. Chairman, and thank you for referencing the bill. It was introduced Tuesday, H.R. 2569. It contains environmental and consumer protection provisions that I believe are critical to the restructuring debate. I am pleased to note that my bill has support from a large spectrum, if you will, the environmental community, consumer groups, utilities, and others.

Secretary Richardson attended our press conference Tuesday to lend his support to the importance of including environmental and consumer protections as we continue through this restructuring debate. The core of my bill is designed to reduce emissions from all power plants, not by mandatory regulations, but by using a market-based approach to achieve environmental and human health benefits in a cost-effective manner.

As the Natural Resources Defense Council reiterated, energy and environmental sustainable development issues are intricately linked. Other provisions that I have included in my bill, such as the renewable portfolio standard, net metering, a Public Assistance

Benefit Fund, and anti-slamming and anti-cramming protections are in the Administration's bill, as well as other bills, some of which are before us today.

I think that shows the wide range of support for these type of provisions. I know that in the testimony today by AARP, and we will hear that, it is mentioned that we cannot create disadvantages, nor unfair competitive advantages, particularly for consumers as we consider restructuring the electric utility sector on the Federal level. A Public Benefit Fund is one way to ensure universal service for all customers.

To ensure transparency, my bill includes information disclosure or labeling provisions that will be similar to food labels, so the consumers can choose their electricity suppliers with complete knowledge, because they will have generation and emissions data in an easy-to-read and easily understandable format.

Again, AARP is supportive of full disclosure of information, including whether power is interruptible, which my disclosure provision also would ensure. In addition to the anti-slamming and anti-cramming provisions, my bill ensures consumers privacy by prohibiting the release of confidential information without explicit permission of the consumer. Now, we all know that Americans spend over \$215 billion each year on electricity.

So, we must take extreme care in thoroughly examining all of the issues pertaining to this debate. If we are to enact Federal restructuring legislation, we must make sure we get it right the first time. So, I will be interested in hearing from our witnesses on a variety of issues.

For example, reliability I think is very central to this debate. It has been a major issue in my home State of New Jersey during the past several weeks and in the Northeast, in general. As I am sure you know, we have experienced various rolling blackouts. As more States move toward restructuring, we must remove barriers to competition in a manner that is equitable.

We must determination what issues need to be handled at the Federal level versus the State level, and clarify State versus Federal authority. So, I look forward to hearing from our witnesses on these and other issues. Thank you, Mr. Chairman.

Mr. BARTON. Thank you, Congressman Pallone.

We would now like to hear from Mr. Burr of North Carolina for an opening statement.

Mr. BURR. I thank the chairman and would also thank the chairman for allowing the full committee chairman to have a witness today.

Mr. BARTON. We ran out of Texans, you know.

Mr. BURR. Clearly, we now know the population of Texas, at least those willing to come testify. We have learned a lot from the Texans who have come up here. Certainly the ones today, I am sure, will have a wealth of knowledge, not only about what Texas has done, but how the Texas experience so far might guide us as to what we do. I think that is very, very important; from Texas and other States that have started on it.

We are here to review 8 or 9 bills. I am not sure, based upon the information that Mr. Pallone has a bill. That number is only surpassed by the number of witnesses we have to testify today. So,



if quantity is an indication of quality, this will certainly be a knowledgeable day that we are started into. I am sure that it will be somewhat long.

Let me take this opportunity to welcome all of the witnesses. I think that 90 percent of them will now go on my Christmas card list, as much time as we have spent together. Clearly, I welcome that because I think we will spend a lot more time over the next short-term trying to work out some of the differences.

Clearly with 8 or 9 bills and one general outline introduced, this committee has a wealth of options to choose from. A wealth of options does not suggest that we automatically get it right. I think that the one plea that members of this subcommittee have made, at least this calendar year, is that our No. 1 interest is to get it right.

To get it right means that we have to urge all of our witnesses, whether it is this hearing today, past hearings that we have had, and future hearings that we might have, to level with us; to tell us what it is that gets us to the right bill. I do not think that it is in total any one of the eight or nine bills. After my review of the outline, I do not think that it is in fact the answer in total.

It may be a mixture of all nine and the outline. It may in fact be a new document that we have yet to think about. Clearly, that is the responsibility that lies on our shoulders. It is also the responsibility that lies on the shoulders of the individuals who represent the consumers around this country.

I am confident that no witness has ever come before this committee and talked about electricity restructuring without consumers first and foremost in mind. Clearly, when you talk about this industry, in total, we do talk about an industry that is in a major shift. I have one very big principle in this. That is to see that if we introduce a deregulation bill, that it in fact deregulates electricity. I am not interested in substituting a new regulatory authority into the industry, but to call it something different.

The challenge for this committee is to make sure that what we do is predictable, understood by all segments of the industry, welcomed by Wall Street, but, more importantly, welcomed by consumers around this country. I, for one, and I believe Mr. Barton, Mr. Hall, and many of the colleagues that I serve with, will not quit until we reach that point. It will not be a Republican bill. It will not be a Democratic bill. It will be a bipartisan bill that attempts to find the balance that is best for the country.

I think for that reason, there is a great deal of optimism that we will reach that agreement. We will come as close to perfect as we possibly can from the information that is shared with us by witnesses. Mr. Chairman, I thank you for the opportunity to highlight these bills that have been introduced.

Mr. BARTON. One of which is your bill.

Mr. BURR. One of which is my bill. I am not concerned with authorship. I am more concerned with the final product. I think that is the case with everybody who has introduced a bill. I would only urge our witnesses today to tell us what we need to do to get it right. That is the most important thing you can share with us. With that, I yield back.

Mr. BARTON. If you just said, it will take care of Texas, you would have had a perfect opening statement.

Mr. BURR. Mr. Chairman, clearly with an ovation from Texas, I have said something wrong.

Mr. BARTON. Let me be serious for just a moment. That was a great presentation and opening statement, that all us are proud of and would be proud of. How about that?

The gentleman from the great State of Tennessee, the Volunteer State, Mr. Bryant, is recognized for an opening statement.

Mr. BRYANT. Thank you, Mr. Chairman. It is a difficult act to follow. I do not intend to try to compete with that. In one hearing yesterday where Mr. Burr and I sat together, I associated myself with his remarks. I will do the same thing here. Again, I thank you for convening this panel and the second panel as we move toward what may be a final product.

I commend you for your efforts and your ranking member here, Mr. Hall, for keeping this an open process as much as possible, giving everyone opportunities to participate, attend hearings and working groups, and try to make some sense out of a very complex issue.

Coming from a TVA State, certainly we have concerns for TVA. Likewise, and even more importantly, for the consumers of TVA, our constituents. We have a caucus, and we have been working together trying to develop a consensus, as you have asked, to bring to you and to the chairman of the full committee on what we would like to see a bill look like as it pertains to TVA. That, too, is very complicated and very complex.

Let me assure you that we will continue to work in good faith. We, again, thank all of you for being here today. I know many of us have other committees that we are on. There is another Commerce subcommittee meeting ongoing right now. We will be in and out.

Let me assure you that we are studying your remarks and your statements and value, very highly, your input in this, both this panel and the second to come. I will yield back the balance of my time.

Mr. BARTON. Thank you, Congressman Bryant. I think one of the most complex and difficult issues to find a consensus on are some of the issues dealing with the TVA. I want to state on the record that the work that you have already done, and are continuing to do, is excellent. It is bearing fruit.

I've had a number of individuals from your region comment on that and a number of other Congressmen from the region comment on that. So, you are doing good work and we appreciate that.

The co-chairman of our Working Group on Electricity Restructuring, Mr. Sawyer of Ohio, for an opening statement.

Mr. SAWYER. Thank you, Mr. Chairman. Thank you for having this hearing. Thank you for all of the work that has gone into this issue. You are right to characterize it as complex and important.

It is one of those that I think we can accurately call a Century bill. The work that has lead us to this juncture is a Century old. If we do our work well, the changes that will take place over the next Century will find their basis in the product that we bring out in this issue.

I would also like to thank all of my colleagues for having taken such care and time to take enough time so that I can be 38 minutes late for the start of this hearing and still not have missed a bit of testimony. With that, I will not take up any more of your time.

Thank you, Mr. Chairman.

Mr. BARTON. We thank you. The Chair must admit, I was somewhat late. I was uncharacteristically late. The gentleman from Oklahoma, who has one of the bills that is going to be reviewed today, and one of the more comprehensive bills with Mr. Markey. He has done excellent work on this issue; Mr. Largent of Oklahoma for an opening statement.

Mr. LARGENT. Thank you, Mr. Chairman. I would like to begin by saying thank you to a number of our panelists and people that I see here in the audience today who have participated in our working group and lent their expertise to our small working group that has been working on electricity because their insight has been really valuable for us all.

I want to thank you for calling this legislative hearing. I have a brief opening statement that I would like to read and then yield back. Thanks for having this legislative hearing to specifically address provisions in the Electricity Restructuring Bills introduced to this Congress.

This hearing is an indication that we are coming down to the wire in our efforts to vote on a plan to give consumers choice of their retail electric provider and that, I wanted ask specifically in my opening comments, because I understand there are some discussion and rumors that are traveling around K Street and downtown that we have stumbled in our effort to move forward on electricity.

I wanted to assure everybody that we are continuing to move forward, with a lot of momentum, and I am excited about that. I am proud of a bill that I have introduced with Representative Ed Markey, H.R. 2050, the Electric Consumer's Power To Choose Act, as the only bipartisan and comprehensive electricity restructuring bill initiated in the House.

I feel that we have demonstrated that the challenge of opening up the electric industry to retail competition is one that can be met when Republicans and Democrats put politics aside and get to work on the policy. The Largent-Markey Bill focuses on the areas critical to fair and open competition. These areas include: setting a date for competition with flexibility; strong reciprocity; authority; preservation of the sanctity of State Competition Plans with explicit grandfather language; market-wide reliability standards; repeal of antiquated Federal laws like PUHCA and PURPA; moves FERC responsibility from regulating to refereeing; removes obstacles in transmission that maximize competition and generation; consumer protections from slamming, cramming and privacy abuses; encourages aggregation; interconnection and interstate compacts; protection from increasing prices result from market power; environment-friendly tax credits; and triggered renewable portfolio standard.

Let us recall why we believe this challenge is worth accepting. Americans consume more than \$200 billion of electricity a year, with about half of that used for residential purposes. Studies indi-

cate that consumers will save between \$20 billion and \$40 billion through competition. I might add by the way, that it is quite possible that consumers will save more in the first 5 years after electric deregulation, than they will under the tax bill that we will be voting on later today. What about the savings from the products we buy?

It requires approximately \$700 in electricity to manufacture a single car. The cost of electricity in bringing food to the market is second only to labor. The benefits of electricity touch us all, but so does the increased cost of the monopoly under which it is generated today.

Competition brings out the best in all of us, including the industries that we have deregulated: airline, long distance, trucking, railroad. Over a 10-year period, we have seen drastic reductions in costs from anywhere from 27 to 57 percent. Even in the wholesale electric industry, savings are estimated to be about \$4 billion per year.

Similar savings in retail electricity rates could save our school districts 35 percent on their electricity bills, and our hospitals' vital health care dollars as well. The Largent-Markey bill is pro-consumer, pro-economy, pro-free market, pro-environment. I am looking forward to hearing the views of our panelists on H.R. 2050, and the other bills introduced before this subcommittee. I think it is great that so many of my colleagues have also gotten deeply involved in the debate by introducing bills of their own. I look forward to learning more about all of them.

Thank you, Mr. Chairman.

Mr. BARTON. Who could not expect a pro-bill from a Pro Football Hall of Famer? It would have to be pro-competition.

The gentleman from the great State of Georgia, Mr. Norwood is recognized for an opening statement.

Mr. NORWOOD. Thank you very much, Mr. Chairman. I appreciate being recognized. I, one more time, want to say how much I commend you and appreciate you on the hard work you have exhibited in holding these hearings, and bringing to light many of the issues that need to be explored.

I do not really see how we have left any stones unturned. Most of the witnesses have been up on the Hill time, and time again, over the last 6 months. When it has come time for us to really look at the nuts and bolts of deregulation, you have done an outstanding job, and all of you, ladies and gentlemen, are appreciated in your efforts in coming back to try to help us as we operate on your industries.

We have heard from organizations, advocates, and experts from all across the spectrum on nearly all aspects of these issues. I do not think anyone can say that they have been shut out of this debate. Mr. Chairman, in my opinion, that is the right way to conduct hearings and get us to the point where hopefully we can produce a bill that really will foster competition, and really will deregulate; not get us to a bill where we break down industries that we call monopolies and say that we want you to compete, however, we are going to just regulate you in a different way now that you are competing. I compliment you, Mr. Chairman.

Now that the hearings are hopefully coming to a close, I hope and expect that this same spirit of inclusiveness can be carried forward into the process of actually drafting a bill. Because of your hard work and, the fact that you have driven members of your subcommittee, you have, in my observation, a very knowledgeable subcommittee on this subject.

I think it is our duty and responsibility, as a subcommittee, to roll up our sleeves and get to work on the legislative language from bottom to top; not for us to simply just rubber stamp whatever a committee staff drops in our laps. This issue is far too important and there is far too much at stake for us as a subcommittee to abdicate our responsibility on this issue.

I know and I feel strongly, Mr. Chairman, it is your intention to have an inclusive bill. It is your intention to allow us to participate with the understanding that probably none of us need or require the pride of authorship. Where that generally occurs is in committee, where they wish to have pride of authorship. And on this issue, as important as it is to rural Georgia, as important as it is to Washington, Georgia, and Monticello, Georgia, people that their lives can be turned upside down if we do this wrong.

As important as it is, Mr. Chairman, I am glad you are the chairman because I know you know, we are not going to let a staff drop a final bill on our laps and rubber stamp it. Thank you very much, Mr. Chairman.

Mr. BARTON. Thank you, Congressman Norwood.

I am not sure where Monticello, Georgia is, but I do know that they have a good Congressman, if they are in your District.

Mr. NORWOOD. Mayor Holmes, on her behalf, will invite you to come any time you like, I can tell you.

Mr. BARTON. I was in Savannah, Georgia several weeks ago for a U.S.-Mexican exchange of parliamentarians. I had never seen homemade pecan pralines made from scratch on the spot until then, and just given to me hot. There is nothing better in this world than a homemade Georgia pecan praline cooked as you watch it.

Mr. NORWOOD. If you will yield, I want to say again, what a good chairman you are.

Mr. BARTON. I ought to quit while I am ahead; should I not? Congressman Ehrlich of the great State of Maryland is recognized for an opening statement.

Mr. EHRLICH. Thank you, Mr. Chairman. I just simply will adopt the remarks of the gentleman from Georgia; well-put from my friend and classmate, and I yield back.

Mr. BARTON. Thank you. Seeing no other member present on either side that has not yet been given an opportunity to give an opening statement, all members not present that have written statements will be put in the record at the appropriate point in the record. Without objection; hearing no objection, so ordered.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Mr, Chairman, I would like to commend you for holding this legislative hearing on some of the bills addressing electric utility restructuring. I would also like to commend you on the leadership you have shown on this issue thus far, and that

I'm sure you will continue to show as we work to pass legislation which will help bring about a fully open and competitive electricity power market.

Today is an important milestone. It marks the beginning of the final phase of hearings before we will begin marking up electric utility restructuring legislation. As I have stated many times in the past, I believe bringing retail competition to the electric utility industry will be good for this country. The fact that 23 States with 60 percent of the population have taken steps to move to retail competition shows that I am not alone in that belief.

Despite that tremendous progress, the job is not done. We would be shirking our responsibilities if we failed to pass Federal legislation doing the things which must be done on the Federal level if these programs are to work as intended. In particular we must assure the national grid is as open as possible. We must also assure that there are no holdovers from the old system of monopoly regulation that pose barriers to new entrants. Competition in electricity will only work if the system is as open as possible so competitors can reach customers and customers can reach competitors. This may mean putting in place mechanisms to assure that transmission lines do not become bottlenecks allowing incumbents to exert their market power to keep out new entrants as well as other protections.

Today is the first step in identifying what elements in particular need to be included in a Federal bill. I am grateful to all of the witnesses who are participating in today's hearing. You and the organizations you represent play an important role in helping us develop electric utility restructuring legislation that will benefit all Americans.

Thank you Mr. Chairman. I look forward to hearing the testimony of our distinguished witnesses today. I also want to thank you for including, among the many witnesses we've had from Texas, a witness from my home town of Richmond, Virginia. Ms. Jana Price-Davis, Assistant Vice President for Government Affairs for Heilig-Meyers Co., the nation's largest furniture retailer, is here today representing Americans for Affordable Electricity and I'd like to extend to her a special welcome.

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PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF MISSOURI

Thank you Mr. Chairman. I rise to revise and extend my remarks. I welcome the opportunity to continue the dialogue on electricity deregulation and thank the Chairman and Ranking Member Hall for our efforts today to come to terms with the complex issues associated with electricity deregulation. As the last major federal deregulation of this century it is important that we in Congress carefully consider all options and act with measured reason.

Our states are the incubators of change, and 23 states have acted to address this issue, while many others, including my state of Missouri, currently are considering reform. Our actions at the Federal level should compliment their successes and be mindful of the potential negative impacts which might occur through a federal mandate. I represent a district with a low kilowatt hour rate. Our actions at the federal level should assure consumers such as those in my district and state that they will not pay more for power as a result of deregulation.

There are worthy ideas in these measures, and our challenge is to refine them and develop a consensus for action. One positive step is a provision to encourage greater use of renewable energy. Employing green technologies is a win-win, for and in the long-term they yield a comparative competitive advantage while reducing our dependence on imported fuels. Besides increased efficiency, renewable energy sources help to distribute the burden of supplying energy to our country. All of our districts are struggling with meeting emission requirements and know that renewable energy plays a critical role with respect to emissions. Affording incentives for utilities to pursue a strategy utilizing renewable sources of energy is a provision which should be included in the final measure.

When I am home in my district each week, I visit with constituents in a number of settings, such as in community meetings and at the Farmer's Market or car wash. In my conversations with these individuals they express opinions on a variety of issues. Every time the subject of electricity deregulation comes up, they assume that their rates will go down and their service will remain the same. Our experiences from other deregulated industries suggest that improvements can occur but better rates and service do not always occur. Our challenge is to make this perception among the citizens become a reality. In order to accomplish this both residential and commercial consumers must be foremost in our mind as we continue to move forward on deregulating the delivery of power.

I welcome today's dialogue as another step toward a measured approach for addressing electricity deregulation. Ultimately we are talking about people's light and heat—we have to get it right—close just won't work. Many of these issues are interwoven and very complicated necessitating comprehensive review by our subcommittee and calculated actions in moving forward thoughtfully. Thank you, Mr. Chairman.

Mr. BARTON. We now want to welcome our first panel. Congressman Hall is not here, but he said it is a good thing we do not have any more tables in the room, because the panel would have been bigger. We have about the maximum number of people we can get with the maximum number of table space that is available.

We are going to start with Mr. David Owens, who is the Executive Vice President for the Edison Electric Institute. Then we are going to go to Ms. Jana Price-Davis, who is the Assistant Vice President for Government Affairs for Heilig-Meyers Company in Richmond. She is representing the Americans for Affordable Energy.

Mr. Steven Kean, who is the Senior Vice President for Enron in the great State of Texas, in Houston, representing the Electric Power Supply Association; Mr. Allen Richardson, the Executive Director of the American Public Power Association; Mr. Glenn English, former Congressman, from the great State of Oklahoma, all around good guy, show horse and work horse, as Congressman Hall said. He is the Chief Executive Officer for the National Rural Electric Cooperative Association. Next, Mr. Ralph Cavanagh, representing the Natural Resources Defense Council, who has come all the way from San Francisco, California. We appreciate you being here sir.

Last, but certainly not least on the first panel, Mr. Fred Schmidt, who is the President of the National Association for State Utility Consumer Advocates, who has got to be the longest named association that we are going to hear from today. We are glad to have you.

Each of your statements are in the record in its entirety. We are going to start with Mr. Owens. We are going to go right down the line. We are, since we have so many people, we are going to try to hold you fairly strictly to the 5-minute rule to summarize your opening statements. We will have sufficient time for questions.

Let me get the clock set here. Mr. Owens, we are glad to have you. You are recognized for 5 minutes.

**STATEMENTS OF DAVID OWENS, EXECUTIVE VICE PRESIDENT, EDISON ELECTRIC INSTITUTE; JANA PRICE-DAVIS, ASSISTANT VICE PRESIDENT, GOVERNMENT AFFAIRS, HEILIG-MEYERS COMPANY; STEVEN J. KEAN, EXECUTIVE VICE PRESIDENT, ENRON CORPORATION; ALAN H. RICHARDSON, EXECUTIVE DIRECTOR, AMERICAN PUBLIC POWER ASSOCIATION; GLENN ENGLISH, CHIEF EXECUTIVE OFFICER, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; RALPH CAVANAGH, ENERGY PROGRAM CO-DIRECTOR, NATIONAL RESOURCES DEFENSE COUNCIL; AND FRED SCHMIDT, PRESIDENT, NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

Mr. OWENS. Thank you, Mr. Chairman.

Good morning, Mr. Chairman and members of this subcommittee. I am David K. Owens, Executive Vice President of the

Edison Electric Institute. EEI is the Association of U.S. shareholder-owned electric utilities. We are pleased to share our views on specific issues and legislation pending before this subcommittee.

Now, it is hard for me to believe that just 3 years ago this May, the first State adopted a Retail Competition Plan. Today, roughly 70 percent of all electricity consumers live in the 22 States that have already approved Customer Choice Programs, with Oregon about to become the 23rd State.

As States move forward with their Retail Competition Plans, there are significant restructuring issues that they cannot address. EEI supports Federal legislation that removes barriers to competition, facilitates State restructuring actions, addresses critical transmission and reliability issues, and applies the same rules to all competitors.

Regarding Federal barriers to competition. First, we support repeal of PUHCA. PUHCA distorts electricity suppliers' business decisions and hinders competition. We urge passage of H.R. 2363, introduced by Representative Tauzin.

Second, we support prospective repeal of PURPA's mandatory purchase obligation. We also feel strongly that Congress must assure the recovery of PURPA costs, since these are federally mandated, Federal jurisdiction costs. The PURPA Reform Bill, introduced by Representative Stearns, H.R. 1138, recognizes the distortion PURPA causes in a competitive marketplace.

We also believe that Congress should facilitate State restructuring activities. In this area, we strongly support respecting the 22 States that have already moved forward in electric restructuring. Congress should clarify that States have the authority to restructure retail electric service, and impose non-bypassable wires charges to fund Public Purpose Programs.

Both the Burr bill, H.R. 667, and the Stearns bill, H.R. 1587, accomplish this, in our opinion. We believe Congress should endorse a utility's right to recover legitimate transition costs, while recognizing that States are implementing recovery of retail transition costs.

Experience in the States demonstrate that competition is implemented more rapidly when transition cost recovery is dealt with responsibly. Congress must also address critical transmission and reliability issues. First, all transmission providers should be subject to FERC jurisdiction over transmission service.

The Stearns bill, H.R. 1587, in our opinion, provides a good start. Second, we support facilitating the construction of new transmission facilities. This may include reforms to the siting process, and certainly transmission pricing policy that provides incentives for the expansion and the development of new transmission, and also rate of return on transmission to attract necessary capital.

Concerning reliability; something that Mr. Pallone raised. We strongly urge Congress to enact the NERC Consensus Proposal establishing a self-regulating reliability organization under FERC oversight. The NERC proposal is in the Largent-Markey Bill, H.R. 2050.

Congress should also assure that the same rules apply to all competitors. We support eliminating new tax benefits for government entities in a competitive market. The administration's bill, H.R. 28,



moves in the right direction. We also support prohibiting Federal utilities from constructing new generation, except under limited circumstances. Now, as you consider electric legislation, we would hope that you would heed the comments of Mr. Pallone and others, let us get it right. We believe that there are areas where Federal legislation is necessary. We also believe that there are areas where it is not necessary.

For example, we oppose new Federal authority to order divestiture, or participation of utilities of regional transmission organizations. As you know, utilities are the most heavily regulated businesses and are subject to a myriad of existing Federal and State laws or market power issues.

Representative Stearns' bill, H.R. 1587, would encourage regional transmission organizations to develop with denying them the necessary flexibility. Now, on merges we believe that Congress should streamline their review and not impose additional restrictions.

Finally, any electric restructuring bill should not be used as a vehicle to address broader environmental issues. Thank you for this opportunity. I would be pleased to answer questions.

[The prepared statement of David Owens follows:]

PREPARED STATEMENT OF DAVID K. OWENS, EXECUTIVE VICE PRESIDENT, EDISON  
ELECTRIC INSTITUTE

I am David K. Owens, Executive Vice President of the Edison Electric Institute (EEI). EEI is the association of U.S. shareholder-owned electric utilities and industry affiliates and associates worldwide. A super-majority of EEI's members have established EEI's approach to competition in the electricity industry, although a few members disagree with some elements of that approach. We are pleased to have the opportunity to share our views on specific issues and legislative proposals pending before this Committee.

The pace of electricity restructuring in the states is far more intense than occurred in either the telecommunications or natural gas industries. Just three years ago this May, the first state adopted a retail competition plan. Today, roughly 70 percent of all American electricity consumers live in the twenty-two states that have approved customer choice programs. Oregon is about to become the twenty-third state once the governor signs the retail competition plan approved by the state legislature. The remaining states and the District of Columbia are considering reforms to retail electric service.

As states move forward with their retail choice plans, it is obvious that there are significant restructuring issues they cannot address. We believe Congress should resolve these issues to help facilitate state activities and remove federal barriers to competition. While government cannot and should not control market forces in a competitive environment, it is responsible for addressing the transition issues and establishing the ground rules for fair and effective competition.

As Congress considers electricity restructuring legislation, it is essential to understand how dramatically electricity markets are changing. One of the few constants in the electricity industry today is fundamental change. All too often, proponents of re-regulation or different regulation of competitive electricity markets ignore this reality.

*Today's Changing Electricity Market*

It is important to remember what will be regulated and what will not be in competitive electricity markets. Electricity suppliers will compete to sell power and energy services to consumers. However, the "wires" side of the electricity business—the distribution lines that deliver power to homes and businesses and the interstate transmission lines that move bulk power between sellers and buyers—will remain regulated for the foreseeable future.

One of the keys to competitive markets is the existence of competitors. Thousands of suppliers currently participate in electricity markets, including almost 2,000 municipal electric utilities, more than 900 electric cooperatives, and roughly 200 shareholder-owned utilities. There also are more than 4,000 non-utility generation projects that currently sell their power to utilities, as well as 650 power marketers.

Plans for the construction of new merchant generating facilities representing over 90,000 megawatts of capacity are underway in states from coast to coast. As electricity markets become more competitive, many of these suppliers will be competing head-to-head to provide electricity and a variety of services to consumers.

There also will be new entrants into competitive electricity markets, many of which are large corporations long familiar to American consumers. For example, Shell Oil Company and the recently merged BP Amoco Corporation—both among the world's largest oil and natural gas companies—have established subsidiaries to sell electricity. Honeywell, Inc.—the world's leading maker of control systems and components for buildings, industry, space and aviation—also has registered to compete in retail electricity markets.

Energy markets are also becoming increasingly globalized. In recent weeks, the Federal Energy Regulatory Commission (FERC) approved the first acquisitions of U.S. electric utilities by foreign companies. In these transactions, National Grid of Great Britain will acquire New England Electric, and ScottishPower will merge with PacifiCorp.

These competing suppliers will move power over distribution and transmission systems that remain regulated. FERC regulates the interstate high-voltage wires of shareholder-owned utilities to ensure guaranteed open access for all suppliers and to set fair and reasonable charges for transmission services. In 1996, FERC, in its Order 888, ordered shareholder-owned utilities, which own about 75 percent of the country's transmission systems, to open up their transmission lines to all suppliers in the wholesale market. This means that any wholesale power supplier can use transmission lines owned by shareholder-owned utilities at the same price and terms that those utilities charge themselves to ship power.

In competitive retail electricity markets, states will still regulate the distribution wires to make sure that all suppliers have access to consumers and to establish fair and reasonable charges for distribution services. The states traditionally have regulated retail electric service, or the sale of power and energy services from the utility to retail consumers, such as homeowners, small businesses and industrial companies.

As electricity markets become more competitive, electric utilities are making strategic decisions about which lines of business they intend to pursue. Because the generation side of the business will carry more risk in a competitive market, a number of utilities believe they do not have the size to adequately manage those risks and are selling their generation facilities in order to focus on other business opportunities. Other companies are purchasing generation with the intention of becoming national generation companies. As electricity becomes more of a bulk trading market, with a greater emphasis on achieving economies of large scale operations, generation companies will need to become significantly larger than most are currently in order to compete in regional and national energy markets.

By the year 2000, about 25 percent of the total shareholder-owned fossil and hydro generation is expected to be offered for sale. The leading purchasers are national and international energy companies, some of them unregulated affiliates of electric utilities that compete around the world and others independent power producers who also are global competitors. Three of the five leading purchasers of divested generation are independent energy producers.

Other electricity market players will pursue different business opportunities. Some energy companies will bundle electricity with specialized services, such as energy management. Others will become "network" companies, utilizing their expertise in the "wires" business to provide cable, Internet and telecommunications services to consumers. Still others will become "convergence" companies, offering consumers the ability to purchase natural gas and other energy sources, along with electricity. It also will be important for these types of companies to achieve economies of scale through mergers and other forms of consolidation to achieve efficiencies and innovation that will lower prices to consumers.

#### ESSENTIAL ISSUES IN THE TRANSITION TO COMPETITION

EEI supports federal legislation that removes federal barriers to competition, facilitates state restructuring actions, addresses critical transmission and reliability issues and applies the same rules to all competitors. We would like to identify those areas in which we believe Congress should act and those in which we believe federal legislation is not appropriate, and give our views on the specific legislative proposals before this Committee.

## CONGRESS SHOULD REMOVE FEDERAL BARRIERS TO COMPETITION.

We believe that Congress can most effectively promote competitive electricity markets by reforming federal law to remove barriers to efficient electricity competition. While the states should continue to have the lead in restructuring retail electric service, they obviously cannot address federal statutes such as the Public Utility Holding Company Act (PUHCA) or the Public Utility Regulatory Policies Act (PURPA).

*Congress should repeal the Public Utility Holding Company Act of 1935.*

PUHCA is an impediment to competitive markets that only Congress can address. We strongly support H.R. 2363, the Public Utility Holding Company Act of 1999, which was introduced by Representative Tauzin. We urge Congress to move expeditiously to consideration and passage of this bill. Representative Burr's bill (H.R. 667) contains the same provisions. These bills would repeal PUHCA 12 months after enactment and substitute a new act giving FERC and state regulatory commissions greater access to the books and records of holding companies and affiliates. The PUHCA provisions in Representative Stearns' bill, H.R. 1587, are similar.

The Administration's bill, H.R. 1828, contains similar provisions but would delay repeal until 18 months after enactment. H.R. 2050, introduced by Representatives Largent and Markey, would not repeal PUHCA for an electric or gas holding company having utility subsidiary companies operating in two or more states that have not elected retail competition. We are opposed to linking PUHCA reform to the implementation of retail competition. It does not make sense to repeal a federal statute on a company-by-company basis.

PUHCA was enacted during the Great Depression and the New Deal in response to the virtual collapse of the holding companies that controlled the electricity industry at that time. By 1932, three holding companies—set up literally as pyramids—controlled almost half of the electricity generated in the country. As the economy collapsed, so did these companies. However, like everything else, the electricity industry obviously has changed over the past 60 years.

In addition, the regulations that govern the industry also have changed. Since the 1930s, states have significantly increased their regulatory oversight of utilities. Other securities laws that cover electric utilities are on the books to protect investors. And, the Federal Power Act, passed in conjunction with PUHCA and amended many times since, provides FERC with tremendous regulatory oversight over utilities.

PUHCA currently acts as a major barrier to electricity competition. First, it imposes an additional layer of regulation and restrictions on 18 registered electric and gas holding companies. PUHCA prevents these companies from responding quickly to consumers' needs and from offering consumers the range of services and products that will exist in competitive markets.

PUHCA also artificially distorts companies' business decisions. PUHCA makes it easier for U.S. utilities to invest in foreign utility assets than in U.S. utility assets. It also discourages non-utility businesses from acquiring utility assets, in effect keeping some potential competitors out of the market because they cannot qualify for an exemption and are unwilling to become registered holding companies. While most utilities can invest in other business opportunities without being affected by PUHCA, registered holding companies have a more difficult time investing in utility businesses in which they have expertise. And, under PUHCA, exempt wholesale generators are prohibited from selling electricity directly to retail consumers.

PUHCA also acts as a barrier to one of the emerging trends in the electricity industry: the growth of regional transmission organizations (RTOs), particularly independent transmission companies. In order for these companies to be regional in scope, they obviously must cover multiple states. However, PUHCA would apply to the ownership of such a company, imposing significant restrictions on its operations.

*Congress should repeal prospectively the mandatory purchase obligation under PURPA, protect existing contracts, and provide for the recovery of PURPA costs.*

PURPA forces electric utilities to purchase power at above-market prices regardless of whether they need the power. New PURPA qualifying facilities continue to be developed even today. This anti-consumer statute will require consumers to pay roughly \$36 billion to \$40 billion above market prices over the life of the PURPA contracts. It is inconsistent with competitive generation markets. It has no justification when there is open transmission access where many different buyers can purchase a plant's output, let alone in a competitive retail market.

The PURPA reform bill introduced by Representative Stearns, H.R. 1138, recognizes that PURPA has no place in a competitive market. It would repeal the mandatory purchase obligation (Section 210) of PURPA prospectively, assure utilities they

can recover the costs they incurred to comply with PURPA, and protect the sanctity of existing PURPA contracts. We strongly support passage of this bill. The same provisions are included in Representative Stearns' subsequent bill, H.R. 1587, and in Representative Burr's bill, H.R. 667. Representatives Largent and Markey's bill, H.R. 2050, also repeals section 210 and provides for recovery of PURPA costs.

The Administration bill (H.R. 1828), while heading in the right direction on this issue, falls short. It would prospectively repeal the mandatory purchase requirement but fails to assure recovery of these federally-mandated costs. Representative Walsh's bill, H.R. 971, while attempting to ensure that rates charged for PURPA contracts do not exceed avoided costs, fails to repeal the mandatory purchase requirement, which is the source of these above-market costs. It also would allow states to require renegotiation of PURPA contracts. While contract renegotiation is one means to mitigate above-market mandatory purchase costs, it should be done by the parties themselves, and any statute should include the basic principle of honoring existing contracts.

Because PURPA is a federal statute, and PURPA contracts are wholesale contracts, the federal government has a clear responsibility to assure the recovery of these costs. Under the Federal Power Act, FERC has exclusive jurisdiction over wholesale sales of electricity. States are prohibited from denying utilities the opportunity to recover FERC-approved wholesale costs, including, arguably, costs associated with contracts mandated by PURPA. In addition, PURPA itself has been interpreted to preclude states from denying the passthrough of PURPA contract costs.<sup>1</sup>

#### CONGRESS SHOULD FACILITATE STATE RESTRUCTURING ACTIVITIES.

*Congress should respect state decisions regarding retail competition.*

The bills introduced by Representative Burr (H.R. 667) and Representative Stearns (H.R. 1587) take the right approach on this issue: both bills would clarify that states have the authority to restructure retail electric services under their own timetable, taking into consideration the interests of their consumers.

The so-called "flexible mandate," similar versions of which are contained in both the Administration bill (H.R. 1828) and the Largent-Markey bill (H.R. 2050), in fact, gives the states too little flexibility. H.R. 1828 would require distribution utilities to provide open access to consumers by January 1, 2003, unless the state regulatory authority or non-regulated utility made a certain finding. H.R. 2050 requires states to make this critical decision one year earlier. The "opt-out" language contained in both bills significantly limits the state regulatory authorities' actions by providing them with only one standard for opting out: if implementation of retail competition would have a "negative impact on a class of customers of that utility that cannot be mitigated." This standard is completely undefined. The bills also appear to leave the entire decision of whether to implement retail competition to the state regulatory commission, ignoring the critical roles played by state legislatures and governors in state restructuring decisions.

Federal legislation should respect decisions already made by states regarding retail competition. However, the Administration bill (H.R. 1828) does not grandfather customer choice plans already approved by state legislatures and regulatory commissions. And, a state such as Virginia, which is not scheduled to implement full retail competition until 2004, would presumably have to change its state plan to meet the 2003 deadline or the state regulatory authority would have to "opt out" under the non-mitigable negative impact standard.

The Largent-Markey bill does include a grandfathering provision, but its coverage seems incomplete. First, it only applies where the retail competition plan adopted covers retail sales to all classes of customers. On this basis, it would not include the recently passed Oregon bill, which does not include retail choice for residential customers at this time, preferring to bring the benefits of competition to these consumers through portfolio options and savings at the wholesale level. Second, it only exempts a state from making the actual retail competition election. It does not exempt or protect the existing 22 state restructuring plans from the many new federal requirements relating to retail service in H.R. 2050. Some of these requirements may be inconsistent with the provisions in state retail competition plans already adopted. To the extent that a bill includes prescriptive requirements, such as the Administration bill or the Largent-Markey bill, it should respect state decisions that have already been made.

Finally, the Supreme Court decision in *Alden v. Maine* raises questions about the constitutionality of the Administration's flexible mandate approach and the provision allowing enforcement of it in state court. In *Alden*, the Supreme Court held

<sup>1</sup> *Freehold Cogeneration v. Bd. Reg. Com'rs of N.J.*, 44 F. 3rd 1178 (3rd Cir. 1995).

that a person cannot bring a suit against a state in state court to enforce a right under a federal statute, unless the state agrees to waive its sovereign immunity. The *Alden* case appears to put sharp limits on the ability of Congress to make federal requirements, such as the flexible mandate and opt-out provisions, binding on the states.

The Largent-Markey bill (H.R. 2050) also would require FERC to order retail access to Department of Defense facilities and Indian tribes, even where a state has not yet approved retail competition. Again, this fails to respect state decisions on restructuring and could shift costs unfairly to other customers in the state, especially when it preempts state laws and policies.

*Congress should endorse utilities' right to recover legitimate stranded costs.*

Federal electricity legislation should endorse utilities' right to recover legitimate transition costs, while recognizing that the states will be responsible for key implementation decisions regarding retail transition costs. Congress also should confirm FERC's jurisdiction to provide for the recovery of legitimate wholesale transition costs and support recovery of PURPA and other federally created transition costs.

In many states that have approved retail competition plans, utility worker protection has been an integral part of these packages and an integral part of transition cost recovery. To support utility workers who might be displaced, we urge Congress to also recognize that transition cost recovery should include costs for outplacement assistance, job retraining and/or appropriate severance packages for workers.

Because policymakers create transition costs when they promote competition, they have the responsibility of ensuring that utilities can recover these legitimate costs. Allowing industries to recover their transition costs has been a normal part of the deregulation of major industries, including airlines, railroads, trucking, telecommunications and natural gas. Policymakers have taken different approaches to recovery of transition costs in various industries, including direct government subsidies for maintenance of unprofitable services, compensation to displaced workers, special consumer charges, and liberalized merger standards. The length of the transition period to competition also has varied from industry to industry. But, what has not varied is the government's commitment to assure payment of these transition costs.

For almost a century, electric utilities have operated in a business environment vastly different from the one faced by competitive businesses. In order to fulfill their requirements to serve all consumers in their service areas, utilities have invested billions of dollars in generating facilities and a reliable distribution and transmission system. In addition, utilities invest heavily in public purpose programs like low-income energy assistance, energy efficiency and renewable energy resources. They also have been mandated by PURPA to purchase power produced from cogeneration and renewable energy facilities. And, utilities are heavily taxed at the local, state and federal levels.

Before utilities can recover these investments from consumers, the expenditures must be reviewed and approved by regulators, and they are currently included in consumers' bills under regulated rates. Because one of the objectives of regulation has been to stabilize rates for consumers, recovery of these utility investments frequently has been stretched out over as long as 30 or more years.

Government action that denies legitimate stranded cost recovery violates the government's half of the traditional "regulatory bargain" and would amount to an unconstitutional taking. Under the Constitution's Fifth Amendment, the government cannot "take" private property without providing just compensation. Because the property of utilities was committed to serve the public, the Constitution's protection against taking without just compensation requires regulators to set rates to provide an opportunity for an overall rate of return adequate to operate successfully, maintain financial integrity, attract capital and compensate investors. *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Virtually all of the states that have adopted retail competition have provided for transition cost recovery, and they are moving swiftly toward implementing their restructuring plans. In contrast, New Hampshire—the only exception—has been mired in litigation over its failure to provide recovery for commitments made under the prior regulatory regime until recently.

In fact, the judge in that litigation stated that the New Hampshire plan's failure to address transition cost recovery raised serious concerns that it violated the Constitution's Fifth Amendment. Likening a rate order that would have the effect of denying transition cost recovery to the confiscation of private property that occurred in Cuba, federal judge Ronald R. Langeux stated: "If the Constitution of the United States means anything, it means here that the private property of a corporation

cannot be taken without just compensation. What is happening here is that the [New Hampshire Public Service] Commission is acting for the benefit of the rate payers in New Hampshire to the detriment of the people who have invested in these two utilities.— It is, in effect, appropriating to the use of the rate payers of New Hampshire the property of these two utilities.”<sup>2</sup>

A few weeks ago, a preliminary settlement was reached in New Hampshire that will allow competition to proceed and that recognizes transition cost recovery. The lesson is that fair dealing on transition cost recovery is a necessary part of the restructuring process.

The Administration bill (H.R. 1828) recognizes the importance of transition cost recovery. It endorses the principle that utilities should be able to recover prudently incurred, legitimate and verifiable costs arising from the transition to retail competition. However, while the Administration bill provides assurances of transition cost recovery to federal utilities, and allows electric cooperatives and other government-owned utilities to determine their own transition costs, it provides no such assurances for shareholder-owned utilities. The Administration bill provisions addressing transition cost recovery for shareholder-owned utilities should be as strong as those afforded other utilities.

The Burr bill (H.R. 667) attempts to provide incentives for transition cost recovery by tying it to the receipt of federal energy assistance. H.R. 667 also prohibits a state from changing its transition cost recovery provisions for seven years. While this provision appears well-intentioned, we are concerned that it would freeze in place initial state proposals, even if they could bankrupt utilities. In most state proceedings, the final transition cost recovery settlements are the result of intense negotiations.

*Congress should resolve federal/state jurisdictional issues that may impede the progress of competition.*

Since the beginning of the electricity industry, the states have regulated retail electric rates. In the 1935 Federal Power Act, Congress sought to draw a “bright line” between federal jurisdiction affecting interstate commerce and state jurisdiction over matters uniquely local. Any ambiguity in federal law about the scope of state authority to provide for retail competition in electricity should be removed. The Burr (H.R. 667), Stearns (H.R. 1587) and Largent-Markey (H.R. 2050) bills include provisions to clarify state authority. Similarly, federal law should make clear that each state has authority to impose wires charges and similar fees upon all users of electricity within the state, including end-users that connect directly with FERC-regulated transmission facilities. These three bills also allow states to impose a non-bypassable charge on the purchase or distribution of electricity for a number of public policy purposes, including transition costs.

In addition, federal jurisdiction over unbundled retail transmission, that is, the transmission component of a sale once retail competition has been implemented, should be clarified. Finally, federal law should provide reasonable mechanisms to distinguish interstate transmission from distribution facilities subject to state jurisdiction. H.R. 1587 includes a good approach to these issues. The Administration bill (H.R. 1828) also clarifies state and federal jurisdiction.

Legislation should also clarify that states that provide for retail choice have the authority to impose reciprocity requirements, so that all generators that sell, directly or indirectly, to end-users within their borders themselves provide retail choice to their customers. The provision in the Burr bill (H.R. 667) that FERC must certify that the “predominance” of energy sold by a particular seller is produced in a state without retail competition demonstrates the problems of implementing reciprocity provisions. While reciprocity provisions may be difficult to enforce, the Administration bill (H.R.1828) provides a good starting point for addressing these issues. The Largent-Markey bill (H.R. 2050) takes a similar approach, but it includes loopholes that would provide an exception to power generated by nonregulated utilities, such as government-owned utilities and electric cooperatives, that are not themselves open to competition. Finally, while we believe that states should have the option to impose a reciprocity requirement, the federal government should not mandate such a provision. Some states may prefer to allow the consumers unfettered choices of electricity suppliers, while other states may believe promoting competition in neighboring states is in their best interests. Thus, we find the requirement of a mandatory reciprocity requirement in the Stearns bill (H.R. 1587) troublesome.

<sup>2</sup>Public Service Company of New Hampshire, et al. v. Patch, No. 97-97-JD (D.R.I.).

## CONGRESS SHOULD ADDRESS CRITICAL TRANSMISSION AND RELIABILITY ISSUES

In only three specific areas, Congress should grant FERC additional jurisdiction to ensure that the interstate transmission system will be able to meet the challenges and needs of competitive markets.

*Congress should require all transmission providers to be subject to FERC jurisdiction over transmission service to facilitate efficient use of our nation's transmission system.*

Currently, transmission providers such as the federal Power Marketing Administrations (PMAs), the Tennessee Valley Authority (TVA), state and municipally-owned utilities and most electric cooperatives, which together operate about one-fourth of our nation's transmission system, are not subject to the same transmission rules as are shareholder-owned utilities that are subject to FERC jurisdiction. For example, these transmission providers are not subject to the nondiscriminatory open access requirements in FERC's landmark Order 888. In some areas such as the Northwest, these non-jurisdictional transmission providers dominate the transmission system. It does not make sense, from a regulatory standpoint or from a competitive standpoint, to have a significant portion of the nation's transmission system operating under a different set of rules, or in some cases, no rules at all. Only Congress can address this concern by bringing all transmission providers under FERC jurisdiction for regulation of transmission service.

The most comprehensive solution to this problem is contained in the Stearns bill (H.R. 1587), which would amend the definition of "public utility" in the Federal Power Act to include these entities. There is, however, a technical problem in the provision that may prevent it from fully covering all nonjurisdictional transmission providers. The Largent-Markey bill (H.R. 2050) attempts to deal separately with each class of nonjurisdictional transmission providers. In doing so, in what we believe is merely an oversight, H.R. 2050 fails to bring the transmission facilities of PMAs other than the Bonneville Power Administration under FERC's jurisdiction. While the Administration bill (H.R. 1828) attempts to address this issue, it allows too many opportunities for TVA and the PMAs to avoid complying with the same rules as all other transmission providers. Representative Franks' bill (H.R. 1486) also includes a provision to require the PMAs to provide open access, but this provision does not cover the other nonjurisdictional transmission providers. The Burr bill (H.R. 667) does not address this critical issue.

Some have argued that electric cooperatives should be exempted from FERC's transmission jurisdiction because many cooperatives are small or own minimal transmission facilities. FERC already has the authority to grant waivers from its transmission regulations to small transmission providers and has granted such waivers on several occasions. Therefore, this should not be a reason to carve out the transmission facilities of electric cooperatives from FERC regulation, preventing uniform regulation of the nation's interstate transmission grid.

*Congress should provide incentives for the construction of new transmission facilities.*

Perhaps the most critical aspect of transmission policy is to address the substantial barriers to improving and expanding the interstate transmission system. As electricity markets grow and become more competitive, new transmission capacity will need to be constructed. Otherwise, electricity suppliers and regulators will find themselves fighting increasingly pitched battles over who gets priority for use of an increasingly scarce resource.

In the past, transmission was built largely to upgrade the reliability of service by vertically integrated electric utilities to their retail franchise customers. In that circumstance it has made sense for state commissions, who are responsible for regulating retail electric service, to have jurisdiction over transmission additions. In competitive markets, however, transmission must facilitate interstate transactions and enhance the reliability of the interstate grid. FERC's role in encouraging transmission additions needs to be reexamined.

Siting new transmission in a regulated monopoly environment is difficult enough. Eminent domain laws in some states require a demonstration of specific benefits to the state, and even to particular counties, that a proposed transmission line might cross. Increasingly, the benefits of transmission construction may fall primarily outside of the locality, or even the state where most of the construction occurs. Under these circumstances, it may be difficult to obtain the necessary permits from an affected state, which receives few direct benefits and thus has little incentive to approve the construction. As the electricity market becomes increasingly interstate in nature, these individual state requirements may hinder needed transmission expansions.

In order to ensure that the nation's transmission system is adequate to meet consumers' electricity needs and to promote economic growth, Congress should carefully examine ways to remove barriers to transmission expansion, including enhancing FERC's authority over the siting of new transmission in consultation with the states. FERC currently has such authority over natural gas pipelines under section 7 of the Natural Gas Act.

We are certainly mindful of the concerns about possible encroachment on what has traditionally been an area of exclusive state control. To that end, we would recommend that in any proposal enhancing FERC's siting authority, states have the right to act first before resort to any federal authority would be sanctioned.

Another major impediment to transmission expansion is the lack of a transmission pricing policy that provides incentives for construction of new facilities and a rate of return necessary to attract capital to these highly capital-intensive projects. Artificially holding down transmission rates such that no new construction takes place may appear to benefit consumers in the short term, but in the long run, consumers will be harmed. FERC must reform its transmission pricing policy to facilitate needed transmission construction in order to assure the continued expansion of competitive markets.

*Congress should ensure the reliability of the transmission grid by establishing a self-regulating organization to establish and enforce reliability standards under FERC oversight.*

Assuring the reliability of our nation's transmission system is the third area where we believe that additional FERC authority is necessary. Our existing voluntary reliability organizations have served us well. However, with the dramatic changes in the use of the transmission system due to open access transmission under Order 888 and the spread of retail competition, the transmission system is being used by more market participants for more transactions than ever before and for purposes which it was not originally designed to accomplish.

These changes are pushing the existing system harder. The many new entrants in the electric market also make it more difficult to manage the system using voluntary reliability standards. Virtually all industry participants believe strongly that new, enforceable standards need to be adopted to help ensure that our transmission system continues to operate safely and reliably.

Consensus reliability legislation has been developed through a stakeholder process sponsored by the North American Electric Reliability Council (NERC). This proposal would establish an Electric Reliability Organization (ERO), modeled on the National Association of Securities Dealers (NASD), which regulates the stock exchanges and securities dealers. The Securities and Exchange Commission exercises oversight of the NASD, just as FERC would provide oversight of the ERO. Federal government oversight is necessary to assure mandatory compliance with reliability standards and in order for a private organization to enforce the reliability rules under the antitrust laws.

A diverse group including EEI, the American Public Power Association, the National Rural Electric Cooperative Association, the Electric Power Supply Association, and the Electric Consumers Resource Council (ELCON) supports the NERC legislation. Representatives of state regulatory commissions, state energy offices, and the federal government also participated in the NERC process. The members of the coalition supporting the NERC language are working with representatives of various state organizations to resolve a few outstanding issues concerning state authority in this area.

The fact that each of the comprehensive bills before this Subcommittee, with the exception of the Burr bill (H.R. 667), includes a reliability provision demonstrates the critical importance of action on this issue. The NERC consensus language has been included in the Largent-Markey bill (H.R. 2050). The Administration bill (H.R. 1828) contains the NERC language with some changes in language that are significant. We find the reliability provisions in the Stearns bill (H.R. 1587) to be a less satisfactory approach than the NERC language, in part because it gives more authority to FERC at the expense of the broad-based industry ERO envisioned in the NERC language.

CONGRESS SHOULD ENSURE THAT THE SAME RULES APPLY TO ALL SUPPLIERS.

Our principle is a simple, fundamental one: *in competitive markets, the same rules should apply to all suppliers.* This is essential for the most efficient, innovative and responsive companies to succeed. Therefore, Congress should address the role of federal utilities, such as the PMAs and TVA, as well as other government-owned utilities and electric cooperatives, in a competitive market and should deal with federal



subsidies provided to certain suppliers, including the use of federal tax-exempt financing to build new facilities.

The electricity industry is different from other deregulated industries. In industries such as natural gas or airlines, private enterprise did not have to compete with subsidized government providers. In certain regions, such as the Northwest and the Tennessee Valley, government utilities own significant amounts, if not the majority, of both generation and transmission facilities. Only Congress—not the states—has the authority to deal with many of the issues involving the role of these suppliers in competitive markets.

Government-owned utilities and electric cooperatives are taxed very differently at the federal, state and local levels in comparison to shareholder-owned utilities. They also raise their financing differently. Government utilities can issue tax-exempt financing, while electric cooperatives are eligible for direct federal loans and federal loan guarantees. Credit subsidies available to cooperatives and municipal systems are substantial and enhance their abilities to compete and prevail in newly deregulated markets. The value of tax-exempt financing to those municipal systems that can issue federally tax-exempt bonds has been reliably estimated at \$0.5 billion per year. The Rural Utilities Service (RUS) has issued some \$33 billion in low-cost loans and guarantees to electric cooperatives. Roughly 70 percent of this went to generating cooperatives.

A third subsidy to government-owned utilities and electric cooperatives is their preferential access to low-cost power, much of it hydroelectric power, generated at federal facilities and marketed through the PMAs and TVA. Yet another advantage enjoyed by these entities is that their transmission facilities are not subject to FERC jurisdiction.

We are not challenging the right of government-owned utilities and electric cooperatives to exist, nor are we challenging the benefits they enjoy to provide distribution service to their traditional retail customers. However, when government utilities and electric cooperatives use their governmentally-derived benefits to compete directly for customers against taxpaying companies, markets are distorted and tax revenues are lost. Taxpayers in other areas of the country end up subsidizing these suppliers in competitive markets. This “growing government” at the expense of private business in our country is in direct contrast with England and other countries, which are achieving electricity competition by “privatizing” government-owned utilities.

*Put all entities on the same accounting principles.*

Representative Franks’ bill (H.R. 1486) and the Largent-Markey bill (H.R. 2050) make a contribution to needed reforms in this area. Both would require the PMAs (the Franks bill includes TVA as well) to use the same accounting principles and requirements as FERC applies to the electricity operations of public utilities subject to its jurisdiction. The bills would also require these federal utilities to submit rates for their power sales to review by FERC to ensure that costs attributable to generation, such as fish and wildlife expenditures, are included as generation costs. H.R. 1486 would also require that these entities transition to market-based pricing and would retain preferences to power generated by PMAs for government-owned utilities and cooperatives, but at market-based rates.

*Do not subsidize future generation.*

The Administration bill (H.R. 1828) and the Largent-Markey bill (H.R. 2050) begin to restructure TVA, but unfortunately, neither bill addresses the underlying subsidies that TVA or the PMAs receive.

Instead, we support prohibiting TVA or the PMAs from constructing new generation facilities or entering into long-term contracts with other suppliers, except when it is necessary to meet the electricity needs of their current customers. We also oppose removing the TVA fence or allowing them to make retail sales to new customers until these subsidies are removed.

Finally, while H.R. 1828 brings TVA’s operations under the nation’s antitrust laws beginning in 2003, it exempts TVA from some of the most effective tools for antitrust enforcement—civil damages and attorneys fees. Moreover, the bill does not subject BPA or the other PMAs to the antitrust laws in any respect. H.R. 2050 would bring TVA, BPA and the other PMAs under federal antitrust laws, but exempts BPA and the other PMAs from civil damages and attorneys fees.

While the Administration bill and the Largent-Markey bill fall short in removing competitive subsidies for government utilities and electric cooperatives, the other comprehensive bills, H.R. 667 and H.R. 1587, do not address these critical issues at all.

*Congress should provide the same commitment to all competitors regarding transition costs.*

The Administration bill (H.R. 1828) and the Largent-Markey bill (H.R. 2050) also continue to grant special treatment to TVA, the PMAs, government-owned utilities, and electric cooperatives by ensuring their ability to recover transition costs, without a comparable commitment for shareholder-owned utilities. Non-regulated distribution utilities, which will include most electric cooperatives and government-owned utilities, would have the authority to determine for themselves whether they could recover their transition costs. In addition, RUS borrowers would be able to apply to FERC to impose a charge on transmission service to help pay for the recovery of transition costs. H.R. 1828 and H.R. 2050 would also authorize TVA to recover its transition costs. Finally, the Administration bill provides for the recovery of generating costs by BPA and the other transmission-owning PMAs through a surcharge on their transmission rates, thus forcing shareholder-owned utilities to pay for the generating capacity used to compete with them. The Largent-Markey bill (H.R. 2050) includes a similar provision for BPA.

*Congress must address the tax benefits enjoyed by government utilities.*

Finally, amendments to the Internal Revenue Code concerning the tax-exempt status of bonds issued by government utilities are an essential part of a comprehensive resolution to the role of government utilities in competitive markets. The tax provisions in the Administration bill reflect a reasonable compromise, allowing government utilities to avoid current IRS "private use" restrictions on the ability to compete without having to refund existing tax-exempt bonds, but providing, in return, that as government utilities move into competitive markets, no new tax-exempt bonds should be issued for new generation or transmission facilities. The Largent-Markey bill (H.R. 2050), on the other hand, would expand the ability of government-owned utilities to use tax-exempt financing in competitive markets without requiring them to open up to competition.

We believe that legislation introduced by Representative Phil English (H.R. 1253) represents the best solution to this problem. It provides needed flexibility for government-owned utilities that choose to compete, while allowing those that elect not to compete and small government utilities the option to continue to operate under the existing private use rules. These changes are needed to ensure that government utilities that enter competitive markets do not enjoy any new unfair competitive advantages subsidized by the taxpayers.

THERE ARE OTHER AREAS, HOWEVER, IN WHICH FEDERAL LEGISLATION IS NOT  
APPROPRIATE.

As Congress considers electricity restructuring legislation, it should focus on *deregulating, not reregulating*.

*New federal authority to order divestiture is not needed.*

The utility industry is currently subject to intense scrutiny by federal and state governments acting under a number of different federal and state laws to address potential market power concerns. In addition, state restructuring plans are addressing potential market power concerns. For example, the laws recently passed in Texas and Ohio both contain market power provisions. FERC, the FTC and Department of Justice also can address market power issues under their antitrust and merger responsibilities. FERC certainly has adequate authority under the Federal Power Act to regulate wholesale rates, if necessary. Congress should not enact draconian new market power provisions, such as granting FERC new authority to order divestiture, to regulate retail rates, or to mandate participation in a regional transmission organization.

FERC's open access rules address vertical market power concerns by mandating non-discriminatory open access to the transmission grid and removing the ability of integrated utilities to use their control over transmission to gain a competitive advantage in upstream or downstream power markets. FERC's rules also require utilities to separate both information flows and personnel between unregulated power marketing activities and their regulated wires business.

In addition, potential market power is limited by the vigorous competition to construct new generation, which can also be constructed and brought on line much more quickly than in the past. In New England alone, there are proposals to build new plants representing 28,645 megawatts in new generation, which is more than the total existing generation in that region of approximately 23,500 megawatts. In the ERCOT ISO in Texas, over 26,000 megawatts of new generation capacity is being proposed. While all these projects will not be built, they provide strong evi-

dence that a vibrant competitive market imposes price pressure on existing generation.

Many utilities are selling some or all of their generation. Since 1997, generating facilities representing 61,834 megawatts of capacity have been sold or are the subject of pending sales transactions. Companies have also announced their intent to divest generating assets representing another 92,000 megawatts in fossil and hydro-electric generating capacity and over 11,000 megawatts in nuclear generation and purchased power agreements. As previously mentioned, some of the largest purchasers of these assets are independent power producers.

The four largest shareholder-owned electric utilities combined have just a 16.5 percent share of the national market. *Catalogue of Investor-Owned Utilities*, 1997 revenues, 38th Edition, EEI, 1998. By comparison, the four largest long distance telephone carriers generate roughly 72 percent of the industry revenues. *Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission*, February 1999. The four largest railroads run 87 percent of all of the revenue ton/miles. *Analysis of Class I Railroads 1997, Policy and Economic Department, Association of American Railroads*. Defined by total capital, the four largest securities firms have 70 percent of the capital of the securities industry. *Securities Industry Yearbook, 1998-99*, Securities Industry Association, 1998. As we have seen, mergers and strategic alliances within all of these industries continue.

Any evaluation of market power issues must look to where the electricity industry is rapidly heading, not to where it has been, or even where it is right now. As previously discussed, thousands of suppliers already participate in electricity markets and new business opportunities are attracting numerous new competitors, many of them huge international companies. These companies will go head-to-head to sell electricity and other energy services to consumers. They will sell their electricity over wires that remain regulated by the states and federal government to ensure guaranteed, open access to these essential facilities.

Congress should let market trends continue to evolve and should refrain from enacting draconian market power provisions. We commend Reps. Burr and Stearns for not including such provisions in their respective bills. On the other hand, we find that the Administration bill (H.R. 1828) goes too far in giving FERC sweeping new powers. It authorizes FERC to require divestiture of generation facilities, even though states clearly have the authority to address these issues, and extends FERC's reach into retail markets within individual states. The Largent-Markey bill (H.R. 2050) would also give FERC unnecessary new authority to set retail rates—a clear intrusion into traditional state jurisdiction.

*Regionalization of transmission requires flexibility.*

EEI supports grid regionalization policies that rely on flexible, market-based approaches that apply to both private and public transmission providers. Existing regional grid organizations and those under development reflect—and will continue evolving to reflect—changes in technology, reliability requirements, corporate structure, local and regional priorities, market boundaries, and other market characteristics.

Different forms of regional transmission organizations (RTOs) include independent system operators (ISOs), regulated, not-for-profit entities which control and operate transmission systems, but do not own the transmission assets. Another form of a RTO is an independent transmission company (an ITC or transco). A transco is a regulated for-profit company that owns or leases transmission facilities within a certain area. A transco also administers and operates the transmission system.

Since 1997, six independent system operators have been formed, covering the transmission systems of California, Texas, the eastern United States from Maryland north through New England, and a large part of the Midwest. Several other RTOs, including several independent transmission companies, are in various stages of development. On May 12, FERC proposed new measures to promote the formation of RTOs. FERC's new proposed RTO rule will further facilitate the development of RTOs.

RTOs help facilitate competition in electricity markets by assuring that all electricity suppliers will have fair, open access to transmission facilities. They coordinate the use of the transmission lines on a broader regional basis, as well as assuring the continued reliability of the bulk-power transmission system. And, they help reduce costs by eliminating the “pancaking” of transmission rates (the adding of costs for using the transmission systems of different utilities as power is moved across a region). However, RTOs and other market players must have the ability to profitably operate and construct new transmission facilities in order to expand markets.

Just as companies need the flexibility to determine which corporate structure or which business opportunities to pursue as electricity markets change, so, too, should they have the flexibility to determine the best transmission structure for the future. Like everything else in electricity markets right now, these structures are not static or fixed in stone. The appropriate market organizations should be allowed to develop, instead of prematurely mandating one particular transmission structure on a company.

The Stearns bill (H.R. 1587) is consistent with this approach. While it encourages the formation of independent system operators, it gives FERC no new authority to require them. Representative Burr's bill (H.R. 667) is silent on this issue, allowing utilities the flexibility to continue current trends toward regionalization. Both the Administration bill (H.R. 1828) and the Largent-Markey bill (H.R. 2050), however, give FERC unnecessary new authority to order establishment of independent transmission entities, to mandate participation in such an entity, and perhaps even to draw the boundaries of transmission entities, rather than leaving it to market forces to determine the appropriate configurations of regional electricity markets. These bills also would carve out special exceptions for TVA and the PMAs regarding their participation in regional transmission organizations, which are unwarranted.

*Congress should streamline the review of utility mergers.*

As for reviews of mergers, we urge the Subcommittee to streamline and simplify the process. FERC, the Department of Justice, the Federal Trade Commission, the SEC and state regulatory agencies review electricity mergers. Literally no other industry is as heavily regulated with regard to mergers as the electric utility industry.

Many of the mergers are between electric utilities and companies that own natural gas distribution, pipelines and exploration and production capabilities. Combining electricity and natural gas products enables companies to offer consumers convenient "one-stop shopping" for their energy needs. These combinations also give companies more efficient, more competitive operations through economies of scope.

Like almost every other industry in the country, the electricity industry is becoming global, and U.S. companies are positioning themselves to be regional, national and even international players. As a result, more mergers are occurring among energy companies. The reality is that U.S. energy companies are significantly smaller than their European or Asian counterparts. Most of the world's largest utilities are foreign. And, a growing number of foreign utilities are also interested in merging with U.S. utilities. European utilities entering our market are amazed and frustrated at the time it takes to get regulatory approvals, as compared to Europe where regulatory reviews take a fraction of the time.

Federal statutes recognize that mergers are a normal and beneficial part of the competitive process unless they significantly increase market power. Mergers and other strategic alliances can increase efficiencies in product and service offerings, resulting in lower costs and greater benefits for consumers. Yet, regulatory delays in reviewing mergers impose significant costs on companies—impeding efficient combinations—and reduce or delay the benefits for consumers. It usually takes years to complete utility mergers. In comparison, giant multinational oil mergers can be approved in significantly less time, as are combinations of utilities in Great Britain and other European nations.

Representative Burr, by the elimination in his bill (H.R. 667) of FERC authority to review mergers, has apparently concluded that the Department of Justice and FTC have sufficient authority to review mergers. We would certainly agree that utility mergers currently are subject to too many layers of frustratingly slow reviews. The Administration bill (H.R. 1848) and the Largent-Markey bill (H.R. 2050), on the other hand, would expand FERC's authority to review mergers. None of the other bills address merger review.

*Renewable energy should be encouraged, but a mandate is not appropriate.*

Encouraging use of renewable sources of energy is an appropriate policy goal; however, the Administration bill follows the wrong course to achieve that goal. H.R. 1828 would impose a renewable portfolio standard on sellers of electricity of 7.5 percent. A renewable portfolio standard is a hidden tax on all consumers. This mandate also sets an unrealistically high requirement and will force consumers to pay more for electricity. The Largent-Markey bill (H.R. 2050) also establishes a renewable portfolio standard, albeit lower. Both the Administration and Largent-Markey bills ignore hydroelectric power, one of our nation's most abundant and most important renewable energy resources. Polls demonstrate that consumers will voluntarily pay a premium to purchase electricity generated from renewable sources. Many different companies are eager to market such products. Tax incentives may also be a vehicle to promote renewable energy sources. We should let market forces and production

incentives, rather than government mandates, provide the encouragement for renewable energy. Reps. Burr and Stearns, by not including a renewable energy mandate in their respective bills, reach the same conclusion.

*Additional federal requirements for consumer protection should be carefully crafted.*

Public benefit programs, such as low-income assistance and universal service programs, which have traditionally been incorporated in utility rates, need to be restructured to work in a competitive market. States should have clear authority to assure that all users of electricity contribute equitably to the cost of such programs.

We agree that representations about the source of fuels used to generate electricity and their environmental impact must not be false or misleading, but we believe that the Federal Trade Commission and the states can enforce the accuracy of such representations under existing law. To illustrate this, the FTC is holding workshops in September on electricity labeling and the National Association of State Attorneys General is already working on a detailed policy in this area. Thus, new statutory authority for determining the accuracy of claims about electric generation sources, such as is included in the Administration bill, is not needed.

*Electricity restructuring legislation should not be used as a vehicle to address broader environmental issues.*

Finally, we believe that electricity restructuring legislation should be just that. We are opposed to reopening the Clean Air Act or other environmental statutes in this context. This is not the appropriate place to deal with environmental issues. Any changes to the environmental laws should be addressed in a debate that considers all industries, not just one that singles out the electric utility industry.

#### CONCLUSION

As we have outlined, we support legislation that removes federal barriers to competition, facilitates state restructuring activities, and addresses critical transmission and reliability issues. These are restructuring issues that only Congress can address.

The details of how we get from a regulated electricity regime to a competitive market are critical. The electric utility industry is a \$200 billion a year industry, and it is the country's most capital-intensive industry. Electricity powers our economy; it not only is essential to our well-being, it improves the quality of life of every American consumer. That's why we emphasize that it's important that we "get it right."

Mr. BARTON. Well, so far it is Stearns 4, Largent-Markey 1, Burr 1, and the Clinton Administration bill 1. So, Mr. Stearns has asked unanimous consent that the rest of the testimony be dispensed with. But we are going to press ahead. We would now like to hear from Ms. Jana Price-Davis; 5 minutes, please ma'am.

#### STATEMENT OF JANA PRICE-DAVIS

Ms. PRICE-DAVIS. Good morning, Mr. Chairman and members of this subcommittee.

Mr. BARTON. You really need to put that microphone close to you, so that we can hear you in the audience. Thank you.

Ms. PRICE-DAVIS. Good morning, Mr. Chairman and members of this subcommittee. Thank you for allowing me to speak to you today on the issue of electric restructuring. My name is Jana Price-Davis. I am the Assistant Vice President for Government Affairs for Heilig-Meyers Company, which is based in Richmond, Virginia.

I am appearing today on behalf of the Americans For Affordable Electricity, or AAE, a coalition representing a broad array of stakeholders, including large and small consumers, utility and non-utility generators, citizens groups, school administrators, and others.

I am also here on behalf of the International Mass Retail Association which represents the mass retail industry, discount department stores, home centers, specialty discounters, and the manufacturers who supply them. The goal of AAE is to achieve a competi-

tive market for electricity, one in which all consumers have the right to choose their suppliers.

I will now address the various AAE legislative objectives and how they are treated under the several proposals before the committee. First, we favor a date-certain by which all citizens have the right to choose their supplier of electricity.

This is a question of individual rights. Should an individual be subjected to a State-mandated monopoly? We prefer, if possible, the language contained in H.R. 1828 and H.R. 2050. We do not oppose each State's role to provide for stranded cost recovery consistent with the unique concerns and circumstances of its citizens, and based on the market valuation of the assets in question.

However, Federal legislation should guarantee that stranded cost recovery does not impede competition. It should not reward the inefficient at the expense of the efficient. It should not impede technology and innovation. Among the bills introduced during this Congress, we believe that H.R. 1828 and H.R. 2050 provide the best treatment for stranded costs.

Our third issue is aggregation. Federal legislation should in no way restrict any seller of electricity from aggregating consumers. It should guarantee to purchasers, wherever located, the right to join with any other purchaser to buy in an aggregated manner. For example, Heilig-Meyers Company, whom I work for, is currently exploring a number of opportunities for aggregation, not only amongst our stores, but among our employees in the States where that has become an option. Aggregation is important, not only to large purchasers, but to small ones.

Without the ability to aggregate, small purchasers may not be able to reap the benefits of competition. For example, we operate over 1,100 stores in 37 States. Our individual store load profile is such that without the ability to aggregate, even across State lines, we would not be likely to see a great deal of savings on our commodity.

The ability to aggregate should be open to all consumers. The objectives of H.R. 1828 and H.R. 2050 are consistent with those I have outlined. Federal legislation should specify that no consumer's rights and opportunities to obtain alternative electric service should be unduly hindered or discouraged.

This includes the right of an industrial or commercial user to self-generate, and that of a rural consumer to utilize distributive generation. Exit fees and other impediments would reduce these opportunities. We are discouraged by provisions in the several bills that provide legislative authority for States to impose such fees. The linked issues of market power, PUHCA repeal, reliability, transmission, and grid governance are really at the heart of creating and guaranteeing a competitive retail market.

Given that market power would still be exercised by the owners of monopoly transmission facilities, I cannot emphasize enough that regulation is needed to ensure that the owners of transmission systems do not use their position to the detriment of true competition.

Federal and State Regulators must have the authority to prevent this exercise of market power and other practices that restrain trade or competition. Such authority should include the ability to

monitor transactions between regulated and unregulated utility affiliates, mandating the operational unbundling of generation transmission system control, marketing, and local distribution functions, prohibiting cross-subsidization between such entities, and establishing a code of conduct.

Repeal of PUHCA should not be considered on a stand-alone basis. The repeal of PUHCA should not be effective until all customers have the ability to choose their electric supplier. The provisions of H.R. 1828 and H.R. 2050 are much more positive than the stand-alone approach in H.R. 2363.

Related to the issue of market power is the issue of grid management. We believe that FERC should be authorized and required to promulgate rules that provide for the independent operation of the interstate grid; preserve reliability; promote economic, efficient, and competitive markets; and mitigate market power.

Such rules should encourage the sale and transportation of electricity from any seller to any buyer in an open, competitively neutral, and non-discriminatory manner. States have traditionally played a valuable role in electricity regulation. We support the grandfathering of all State actions that promote competitive electricity markets.

Many AAE members are producers of electricity, either as utilities or as non-utility generators. So, there are issues under PURPA that greatly concern us.

Mr. BARTON. Ms. Price-Davis, you need to summarize. I see you have got a whole page remaining.

Ms. PRICE-DAVIS. Yes, sir. We believe that every consumer should have the right to choose a supplier of electricity. On behalf of Heilig-Meyers International Mass Retail Association and Americans for Affordable Electricity, I am asking this committee to develop a comprehensive electric utility restructuring piece of legislation addressing these issues. I thank you for your time and attention today.

[The prepared statement of Jana Price-Davis follows:]

PREPARED STATEMENT OF JANA PRICE-DAVIS, ASSISTANT VICE PRESIDENT,  
GOVERNMENT AFFAIRS, HEILIG-MEYERS COMPANY

Good morning, my name is Jana Price-Davis, Assistant Vice President, Government Affairs for Heilig-Meyers Company, which is headquartered in Richmond, Virginia. Heilig-Meyers Company operates 1,165 stores in 37 states and Puerto Rico. I am here today representing Americans for Affordable Electricity, or AAE, a coalition with over 250 members representing a broad array of stakeholders in the electricity debate including large and small consumers, utility and non-utility generators, citizen groups, school administrators, and others.

I am also here on behalf of the International Mass Retail Association who represents which represents the mass retail industry—consumers' first choice for price, value and convenience. IMRA's membership includes the fastest growing retailers in the world—discount department stores, home centers, category dominant specialty discounters, catalogue showrooms, dollar stores, warehouse clubs, deep discount drugstores, and off-price stores—and the manufacturers who supply them.

AAE was founded on the simple concept of favoring competition over monopolies. Members of AAE want an open market in electricity, with buyers and sellers having the greatest number of options.

When AAE began, we had one common objective—that a federal date certain by which all consumers could choose their supplier of electricity was the best way to create the competitive national market that we all hoped for.

Since then, two things have happened. First, as Chairman Bliley pointed out three weeks ago, the need for a date certain has diminished. We have seen 24 states put into place the framework for retail competition, and as each additional state

chooses a competitive market over a monopoly market, the need for a date certain is less. That is not to say that we would not choose to have a date certain or “flexible mandate” as proposed by Mr. Largent and Mr. Markey (in HR 2050) if possible. That is still the cleanest and simplest way to allow customer choice for all citizens. But we recognize the political hurdles involved and, again, given state action to date, there is less imperative for a date certain.

Second, the members of AAE recognize that in order to achieve the competitive markets we seek, we need more than simply a date certain. Customer choice and retail access are wonderful goals, but they are worthless if the transmission system, which will remain monopolistic for many years, does not allow for the free and non-discriminatory movement of electricity from seller to buyer. Accordingly, in seeking a more open and competitive market, the members of AAE found logical agreement on several other issues. I shall now discuss the various AAE legislative objectives, and how they are treated under the several proposals before the Committee.

#### *Date Certain*

As I mentioned, AAE favors a date certain by which all citizens have the right to choose their supplier of electricity. This is not a question of state vs. federal rights, it is a question of individual rights. Should any individual be subjected to a state-mandated monopoly? If possible, we prefer the language in HR 1828 and HR 2050.

#### *Stranded Costs*

AAE does not oppose each state’s role to provide for stranded cost recovery to resolve those differences consistent with the unique concerns and circumstances of its citizens. Each regulatory commission should base its determination of what constitutes recoverable stranded costs based on the market valuation of these assets, such as through a competitive sale or effective arms length appraisal which properly reflects the assets’ worth in the marketplace.

Given that, if possible federal legislation should guarantee that stranded cost recovery does not impede competition. It should not reward the inefficient at the expense of the efficient. It should not impede technology and innovation.

AAE members believe that HR 1828 and HR 2050 provide the best treatment of stranded cost recovery among bills introduced this Congress.

#### *Aggregation*

AAE believes that federal legislation should in no way restrict any seller of electricity from aggregating customers. At the same time, legislation should guarantee that any purchaser, wherever located, should have the right to join or affiliate with any other purchaser to buy in aggregated manner. This is obviously important for large purchasers—including industrial users and large commercial users such as supermarkets and department stores—who would like to purchase their electricity from one source and receive one bill. But it is also important for small users. As has often been said, most large industrial users already have some ability to negotiate with sellers of electricity. But without the ability to aggregate, small purchasers may be hard pressed to reap the full benefits of competition. Many affinity groups such as labor unions, churches, alumni associations and others could offer electricity on an aggregated basis at lower prices. And I know that several industrial and commercial users are exploring the possibility of allowing employees to purchase electricity through the same aggregator used by the corporation. We would hope that the ability to aggregate be open to all electricity users. The objectives of HR 1828 and HR 2050 are consistent with those I have outlined.

#### *Consumer Rights*

AAE members seek to ensure that federal legislation specify that no consumer’s rights and opportunities to obtain alternative electricity services should be unduly hindered or discouraged. This includes the right of an industrial or commercial user to self-generate or a rural consumer to utilize distributed generation. Exit fees or other impediments would surely reduce those opportunities. By way of analogy, I offer Mr. Markey’s observation that no one would expect that the purchaser of a satellite dish should pay an exit fee to the cable company. We are discouraged by provisions in several bills that provide legislative authority for states to impose such fees

#### *Market Power / PUHCA*

The linked issues of Market Power, PUHCA Repeal, Reliability, and Transmission and Grid Governance are really at the heart of creating and guaranteeing a competitive retail electricity market.

Given that market power—plainly put monopoly power—would still be exercised by owners of monopoly transmission facilities, I cannot emphasize too strongly that



regulation is needed to ensure that the owners of the transmission systems do not use their position to the detriment of real competition.

Members of AAE are not proponents of regulation. We are the side that prefers open competitive markets over regulated markets whenever possible. But as long as the transmission lines are owned by monopolies—and we are not recommending otherwise—they must remain regulated. As Chairman Bliley has often said, “the only thing worse than a regulated monopoly is an unregulated monopoly.”

Federal and state regulators must have adequate authority to prevent the exercise of market power and other practices that restrain trade and/or competition. Such authority should prohibit potential anti-competitive practices between and/or among regulated and unregulated utility affiliates by monitoring the transactions between such entities, mandating the operational unbundling of generation, transmission, system control, marketing, and local distribution functions, prohibiting cross-subsidization between such entities, and establishing a code of conduct. Regulators should have appropriate access to all books and records of regulated entities and entities which they own or control. Repeal of PUHCA should not be considered on a stand-alone basis and repeal of PUHCA should not be effective until all customers have the ability to choose their electricity supplier. Accordingly the provisions of HR 1828 and HR 2050 are much more positive than the stand-alone approach in HR 2363. We also commend the language co-authored by Reps. DeLay and Markey in HR 4432 in the 105th Congress.

#### *Grid Management*

Related to market power is the issue of grid management. AAE believes that FERC should be authorized and required to promulgate rules that: (1) provide for the independent operation of the interstate grid; (2) preserve reliability; (3) promote economic, efficient and competitive markets; and (4) mitigate market power. Such rules should encourage the sale and transportation of electricity from any seller to any buyer in an open, competitively neutral and non-discriminatory manner.

#### *Grandfathering*

We recognize that states have played a traditional a valuable role in field of electricity regulation. We support the grandfathering of all state actions that promote competitive electricity markets.

#### *Other Issues*

Many AAE members are producers of electricity either as utilities or as non-utility generators. In the latter category there are many members with facilities that are qualifying facilities, or QFs, under PURPA.

We recognize that in a competitive market the mandatory purchase provisions of PURPA Section 210 are an anachronism and should be repealed. However it is important to address this issue carefully and not repeal other protections in Section 210, including the right of interconnection and the right to stand-by power, which are vitally important to non-utility generators and have proven invaluable in broadening the base of the generating community. With the repeal of the mandatory purchase provisions, these other protections should extend to all qualifying facilities. HR 971 and HR 1138, in addition to being stand-alone PURPA repeal bills which we do not favor, offer ambiguity as to their intent. HR 2050 comes closer to our objective, but it raises questions about future protections. HR 1828 is perhaps the best approach, but it, too, is less than definitive in protecting all QFs. We believe it is necessary to maintain non-discriminatory access and stand-by power supply for QFs until retail competition is achieved in any state. At the very least, report language qualifying congressional intent may be needed.

#### *Conclusion*

It should be apparent from this statement that AAE members recognize that electricity is an interstate commodity. It does not stop—or even slow down—at state lines. If we want an efficient, national electricity market, we need a federal bill. While AAE recognizes the noble intentions of the authors of HR 667 and 1587, their reliance on state governments to oversee a national industry would not enhance the development of more competition in the interstate electricity market.

As Chairman Bliley recognized in his speech several weeks ago, competition is coming. But the reality is that we face a long transition period before we get there. AAE believes that everyone—except perhaps some intransigent anti-competition monopolies—would benefit if the end state of competition came sooner rather than later. Strong, complete, and comprehensive Federal legislation is needed to achieve that objective.

Every citizen should have the right to choose a supplier of electricity. No consumer should involuntarily be beholden to a monopoly. On behalf of Heilig-Meyers

Company, The International Mass Retail Association and Americans for Affordable Electricity I am asking this Committee to develop a comprehensive electric utility restructuring bill that will address the issues previously outlined herein. Thank you for your attention and interest in this issue.

Mr. BARTON. Thank you. We appreciate that. Everybody's statement is in the record in its entirety. So, if you could try to hold it to 5 minutes, we would appreciate it. She was a little bit sneakier there. She did not use people's names. She used numbers. But as far as I could tell, Largent-Markey picked up 2 votes and the Clinton bill picked up 2 votes. So, they are gaining on you.

Mr. BURR. Do you get any points for not being mentioned, Mr. Chairman? Sometimes that receives a bonus.

Mr. BARTON. I am not counting the negative things. She said some negative things, but I am a positive guy. So, I am not giving black marks. We want to hear now from the Electric Power Supply Association. Mr. Steven Kean is going to give us their view for 5 minutes.

#### STATEMENT OF STEVEN J. KEAN

Mr. KEAN. Mr. Chairman and members of the committee, it is an honor to appear before you today to talk about comprehensive electricity legislation, which I believe provides this committee and this Congress with an extraordinary opportunity to improve our Nation's most vital industry.

Electricity powers our economy, everything from manufacturing, agriculture, to the Internet. It lights, heats, and cools our homes. It is the second largest expense faced by our Nation's schools. Opening this market to competition, as shown by just about any study, will result in—

Mr. BARTON. Pull that microphone up, Steve.

Mr. KEAN. Just about any study shows that opening this market to competition saves tens of billions of dollars a year and, just as important, allows for innovation in technology and services, which simply have not been possible in a regulated monopoly structure.

It is also a bipartisan issue, as evidenced by the Largent-Markey bill, and therefore I think presents the best opportunity for this Congress to do something great for this Nation this year. To deliver on this great promise, the legislation will need to do two things.

It needs to be comprehensive and it needs to be forceful. The legislation needs to be comprehensive because this most essential, most interstate of our Nation's industries is mired in a Century-old public policy framework. That framework is crumbling around us now, with implications for the reliability of the system, and the cost to consumers and businesses of this most essential commodity.

First, the reliability of the electric grid is dependent upon vague and voluntary standards, which are set by the monopolies that control the system. The call for reform in this area has come from everywhere, including the existing reliability organization. Second, as recent blackouts indicate, much of our Nation's infrastructure needs upgrading. Yet it is difficult, if not impossible to site new transmission lines.

Third, many States have passed legislation purporting to open up 60 percent of the retail market to competition, but the interstate grid, which competitors depend on to give the citizens of those

States' choices, is not open. Instead, it is openly discriminatory with perhaps 15 percent of the grid open to competitive uses.

The rest is captive to the raw exercise of monopoly power. Worst of all, worlds creating an unregulated monopoly, both public and private, competitors labor second class access for the grid. In a recent decision has cast doubt on FERC's ability to fix the problem.

In short, interstate transmission is not open today. The success of those State programs that have already been passed is vitally dependent on it and, therefore, dependent on this Congress to fix it.

Finally, jurisdictional structure of the industry is bizentine. Four States which have attempted to open their markets alone have been sued by other utilities in Federal Court claiming Federal preemption. In this realtime industry, it is not clear where to turn for answers.

All of these illustrations have one thing in common. Only Congress can fix the problem. The reliability organization must be reformed to be legitimate, and its governance non-discriminatory in its rules, and have enforceability. FERC must be directed and empowered to ensure non-discriminatory access to the transmission system for all uses and for all systems, public and private.

Third, the customer information channel must be open to competition. We can work on the problems, the reliability problems, in this industry, not just from the supply side, but from the demand side as well. To do that, we need to get the information that lets us know where those investments can be made.

Fourth, the monopoly franchise should be removed. Everybody should have a choice. This is a matter of individual rights, not States' rights or Federal rights. Legislation must get at each of these issues. It must be comprehensive in its scope.

I believe the Largent-Markey bill accomplishes that. The administration bill does as well, which brings me to the final point. Legislation in this area has to be forceful. No monopoly voluntarily surrenders its franchise or its market power. Industry and consumer consensus can yield some common ground, but tough choices remain to be made; access to transmission, choice, the ability to address market power.

Those are choices that have to be exercised by this Body, and they have to be exercised in favor of giving America's consumers and business choice and the benefits of competition. The choices are essential. They require Congressional action. Today the system is broken. I urge you to move this legislation to a "must-do" priority for this committee and this Congress. Thank you.

[The prepared statement of Steven J. Kean follows:]

PREPARED STATEMENT OF STEVEN J. KEAN, EXECUTIVE VICE PRESIDENT, ENRON CORP. ON BEHALF OF ELECTRIC POWER SUPPLY ASSOCIATION

Mr. Chairman, Ranking Minority Member, and Subcommittee Members, my name is Steven J. Kean. I am Executive Vice President of Enron Corp. It is my honor to appear before you.

Enron Corp. owns more than \$30 billion in energy and communications assets; produces electricity and natural gas; develops, constructs and operates energy facilities worldwide; delivers physical commodities and risk management and financial services to customers around the world; and is developing an Internetbased communications network. Enron is currently the largest marketer of natural gas and electricity in North America and serves 700,000 retail customers in Oregon through its

subsidiary, Portland General Electric. Enron owns over 4,300 megawatts of generation and is one of the nation's leading energy management companies, offering commercial and industrial customers a full range of energy services such as commodity and transmission procurement, hardware installation and maintenance, and demand-side management.

Enron Corp. is a member of the board of the Electric Power Supply Association ("EPSA"). EPSA is a trade association that represents the leading competitive power suppliers—including power marketers and developers of competitive power projects—active in the U.S. and global energy markets. While I serve as a corporate officer of Enron and will comment on Enron's experience in the emerging competitive marketplace, my statement reflects the consensus views of EPSA's member companies.

The structure of today's power industry is largely a throwback to the first two decades of this century. At that time, states scrambled to pass laws to address a new industry that was stringing electric cable up and down each side of many roads. Those laws sought to regulate the then-emerging power industry—from generator, through the wires, to switches to the monthly billing statement—as a monopoly, vested with the public interest. This was the case with investor-owned utilities, municipal utilities, cooperative utilities, and even certain utilities that are instrumentalities of the U.S., such as the Tennessee Valley Authority ("TVA"). These utilities were given a state or municipal franchise service territory within which no one would be allowed to compete for their customers. In exchange for this exclusive state or municipal right, these utilities were obligated to provide a certain minimum quality of delivered electricity service, at regulated prices, to anyone that applied for service and could pay their bill or demonstrate creditworthiness. Where state regulation is not permitted to burden interstate commerce, (i.e. bulk power wholesales using the interconnected transmission grid), Congress enacted the Federal Power Act of 1935 to empower the Federal Power Commission and its successor, the Federal Energy Regulatory Commission ("FERC"), to regulate prices and ensure that wholesales and interstate transmission were offered without undue discrimination.

As we approach the next millennium, this model for the Nation's largest industry has become an anachronism. The century old public policy framework is crumbling around us and the consequences are profound. It is depriving consumers of very large potential savings that would result from increased competition, increased efficiency and the technological innovation that competition ignites. Over the last sixty years—particularly since 1978 when Congress took steps that instigated competition in power generation and since 1992 when Congress opened up grid access to competing wholesale generators—experience has shown that much of the power industry is not necessarily monopolistic and could, instead, prosper under competition. The only function within today's power industry that has not yet to show itself to be primed for competition is the wires business. Generating power, marketing at wholesale (and, where permitted, at retail), ensuring reliable deliveries, metering, billing and associated services all promise better service at lower prices through competition.

In my statement I would like to share with you Enron's experience with historical barriers that persist in preventing entry to rivalrous competition in the nonwires services of the power industry. I shall follow my identification of those barriers, with a discussion of actions that Congress must take to eliminate the barriers and a review of the benefits likely to ensue. Where appropriate, I will comment on legislation currently pending before you.

#### *The Exclusive Franchise*

The state or municipal franchise that prevents competition at the retail meter and bill within a service territory is, without a doubt, the single largest obstacle to competition in the power industry. The franchise has entrenched over decades a single supplier of all power products and services bundled and delivered to your light switch, dish washer, store front sign or industrial process. Even in those twenty-four states (representing approximately 60 percent of U.S. consumption) which have taken steps to open up the exclusive franchise, competition remains stymied by the adhesive force of incumbency as well as by the inertia of consumers who have always been captive and, thus, lack experience in being able to choose a provider from among many competitors.

While Congress could leave to the states the decision as to whether to lift the franchise, we at Enron believe that a coordinated national move toward competition would be more fair and sensible for all consumers. If ever there were a service or commodity that is integrated across state lines in interstate commerce and recognizes no political boundaries, it is electric power, as forcefully recognized in the Largent/Markey bill (HR 2050) and the Administration's bill (HR 1828). Perhaps te-

lephony rivals electricity in this regard. However, as this Committee surely knows, the exclusive state franchise over the local exchange was eliminated on a national basis by the Telecommunications Act of 1996. Enactment of that legislation left the power industry as the sole and largest remaining monopoly industry.

Surely consumers benefit even when a single state opens up the franchise. However, a piecemeal, statebystate approach as envisioned by Congressman Burr's legislation (HR 667) and by Congressman Stearns' legislation (HR 1587) will inevitably cause inequities. Although these two bills provide partial solutions and would give needed state authority to those four states which were sued in federal court by electric monopolies claiming federal preemption of state competition plans, these two bills fail to fix the fundamental interstate structural problems. States cannot address interstate commerce. Some legislation before you (HR 667, HR 1828, HR 2050) seeks to attempt to address resulting inequities by reciprocity provisions. However, even the National Association of Regulatory Utility Commissioners (NARUC) has taken a position to outright oppose reciprocity since it would unfairly limit choices for consumers. Whether or not a state acts, we are all dependent on the interstate grid which only Congress can open. State program successes, with cost savings and product innovations that will benefit all consumers is dependent upon interstate transmission which is dependent upon Congressional action. Today, the transmission grid is openly discriminatory with monopoly utilities exercising raw market power. Congress must eliminate the discrimination in access to transmission so all competitors can have the same transmission tariff choices.

New entry by competitors in a truly open marketplace will force prices down for all consumers. With new competitors able to enter the open market, new products will evolve. Only then will new products and new services be able to reach the market. Indeed, experience with other industries that have made the transition from franchise monopoly to competition indicate that, while price reductions have resulted from efficiency gains, the greatest benefits have been the result of new services and product innovations.

#### *Transmission Discrimination Barriers*

Congress must quickly address the competitive structural barrier caused by unequal access to the interstate transmission grid. Congress must require that all users of the grid—traditional utilities and new market entrants, federal Power Marketing Administrations (PMAs) such as Bonneville Power Administration (BPA), and the TVA—are *all* subject to the same rules and procedures for transmitting power in interstate commerce.

If the rates, terms, and conditions for tapping into and transmitting over the grid favor only certain users, then entry by new competitors will be deterred and choices for consumers' choices will be limited. Historically, denying access to their transmission facilities has been the preferred barrier by which traditional franchise electric utilities prevented competition from unwelcome new entrants within the bulk power market. When Congress introduced new nontraditional generators into the market with the enactment of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), the new competitors and their offspring introduced types of competition that traditional franchise holders did not welcome.

PURPA never was and is not now a barrier to competition. This law has been the impetus for the development of competitive markets and a new industry. If Congress determines that this law needs to be amended, first, tread lightly and, second, explicitly acknowledge the principle of contract sanctity and the need to protect existing legitimate contracts. While future competitive markets won't rely on PURPA to be robust, they will require a base built around legal contracts and many competitors. The wrong signals from Congress during this transition could lead to uncertainty about the value of contractual obligations and the bankruptcy of key competitive power suppliers. Congress should only address PURPA in a comprehensive legislative package and not consider piecemeal measures like HR 1138. Legislation such as HR 971 is counter-productive and fails to recognize contract sanctity and the inviolability of federally mandated power purchase contracts.

Even with PURPA, the incumbents' first line of defense against new market entrants was a "Not Open for Business" sign posted on the franchise holder's high voltage wires. Through enactment of Title VII of the Energy Policy Act of 1992, Congress lessened the viability of this defense by authorizing FERC to issue orders, upon application, compelling traditional transmission owners to wheel power for their competitors' interstate wholesales. It took FERC only two years to recognize, however, that even egregious discrimination could not be effectively remedied on the basis of casebycase orders under the 1992 legislation. That recognition caused FERC in 1996 to issue two rulemakings, Orders 888 and 889, that implemented non-discriminatory access to the interstate grid generically, but only for wholesales. This

limitation meant that only 10 percent to 15 percent of the uses of interstate transmission became open to fair competition. The remaining 85 percent to 90 percent of uses by incumbent transmission owners remain bundled with captive, natively loaded sales and cannot be effectively policed for discrimination.

Moreover, a recent decision of a panel of the United States Court of Appeals for the Eighth Circuit calls into question FERC's authority to open even this small portion of the market. While FERC and Enron are pursuing a full Eighth Circuit rehearing of the panel's decision (which we believe is both legally and factually indefensible), the panel's decision, at a minimum, underscores the need for a clear Congressional endorsement of necessary FERC powers to eliminate undue discrimination from all uses of the interstate grid. No legislation before you today clearly subjects to federal jurisdiction interstate transmission that is bundled with retail sales to native load. But it should.

Further, no legislation before you eases the barriers to siting new transmission lines necessary for interstate transmission reliability. Enactment of the federal authority to site new interstate transmission facilities would benefit nondiscriminatory access to transmission by preventing a single state from blocking needed upgrades or expansion of the interstate transmission grid. In addition, Congress must empower FERC to remedy horizontal and vertical market power.

The solution to transmission discrimination is not unique to the power industry; it finds a perfect analogy in FERC's Order No. 636 in the natural gas industry. Following an earlier order that made natural gas pipelines transport the gas sales for their competitors, Order No. 636 made gas sales by the owners of interstate natural gas pipelines subject to the same openaccess transportation tariff and rules as were thirdparty shippers who competed with the pipelines for sales. This had the effect of forcing the pipelines to separate their transportation business from their gas sales business. Thereafter the pipelines ceased to be used as a strategic asset to favor the pipelines' gas sales over the sales of thirdparty competitors; instead the pipelines began to operate as standalone businesses intent on maximizing throughput from all shippers because that became their primary profit center.

The power industry needs the same fix as the natural gas industry received in Order No. 636. Only then will all potential suppliers of power be able to access markets fairly, in rivalrous competition, and only then will transmission owners focus on maximizing the efficiency of the grid on a standalone business. Congress can facilitate this by clarifying in legislation that FERC has plenary authority over electricity transmission in interstate commerce and an obligation to ensure that all uses of the grid are pursuant to the same rules of interconnection and use.

The benefits of a fully open and nondiscriminatory grid promise to be many. First will be increased ability for new suppliers and marketers to enter and compete in markets in which discriminatory transmission access rules previously prevented them from being competitive. Second, and perhaps equally consequential for power consumers, they and their supplier of choice will be able to choose what combination of power services they want. This ability to combine transmission with various supply and demandmanagement combinations would be in sharp contrast to the status quo in which the franchise transmission owner confines the majority of customers to a single, bundled, delivered power product at price X. In short, once the monopoly wires business is fully separated from competitive businesses and available to all users without discrimination, the products delivered through the wires can be recombined and reconfigured in countless ways that meet individualized consumer demand. Absent separation of generation (or load) from monopoly transmission, Congress must give sufficient divestiture authority to FERC to remedy market power. In the active hourly market, existing antitrust laws are inadequate.

#### *Reliability Concerns that Bar Competition*

The reliability of power supply is a paramount concern for suppliers and users of power alike. During the past three decades, the reliability of the highvoltage transmission system has largely been ensured by utility compliance with voluntary guidelines and policies established by the North American Electric Reliability Council ("NERC"). Entry into power markets by nontraditional power suppliers and marketers seeking to compete with traditional franchise utilities has made NERC's task of setting and enforcing standards significantly more onerous. First, there are more transactions on the grid and accommodating their performance, consistent with maintaining grid stability, is simply more work and more cumbersome than it was in the past.

Second, many of the existing rules for ensuring reliable operations were written before any significant competition existed in the power industry; as a result, many of the rules needlessly undermine competition and prevent the benefits of competition from flowing through to consumers. By way of example, until recently, the

NERC rules for managing excessive traffic on wires within the grid entailed quantity rationing, irrespective of economics. In other words, every transaction flowing on that wire was cut back proportionately, irrespective of a seller's or buyer's willingness to pay to avert being cut back or to pay for some other accommodation.

The solution to the barriers that historical reliability institutions and rules pose to power industry competition is to recreate and modernize NERC. As proposed in Congressmen Largent's and Markey's bill (HR 2050) and in the Administration's Comprehensive Electricity Competition Act (HR 1828), a new standard setting organization should be formed to succeed NERC. It would be representative of all participants in the evolving power market and, under authorities delegated to it by FERC, would both establish and enforce reliability standards.

The benefits of succeeding NERC with such a new standardsetting organization speak for themselves. A reliable power industry is important to almost every aspect of modern life and is indispensable for our national economy. With a growing number of competing participants in the market, voluntary rules will no longer be sufficient because cutting corners may be economically advantageous. Thus, the new organization must have some enforcement muscle. Giving it that muscle makes it imperative, however, that the standards that it sets are fair, reflect the interest of all sectors of the industry, and are not hostile to competition.

I cannot overstate the importance of enacting legislation to address the reliability issues and authority this Congress. Last week's hot weather, with brownouts and blackouts, showed once again how fragile the current system really is. Congress must reform the reliability organization so it is legitimate in its governance, non-discriminatory in its rules and able to enforce those rules.

#### *Access to Customer Information*

Competition in the power industry is only worth pursuing if it produces an industry that better meets consumer needs. This means that all potential competitors should have equal access to information about consumer's needs and wants. Historically, only the incumbent franchise utility has had access to this information as it has been gathered at the meter—the point where the generation, transmission and distribution interface with the consumer. This information should be the property of the consumer and not its traditional supplier.

The need for equal access to information on the customer cannot be overstated. Reduced to basics electricity is electricity. Certainly competition among its generators has and will continue to provide value to consumers. Nevertheless, it is in how electricity is packaged and delivered in response to consumer demand that will represent the greatest benefit of competition. If only the incumbent utility that traditionally has owned the customer meter has access to the information recorded through the meter concerning customer demand, then this competition will be thwarted.

Congress should address this obstacle to competition by making clear that historical information on a customer obtained through the meter belongs to the consumer, as addressed in the Congressmen Largent and Markey bill. Doing so will make an enormous difference in giving a voice to consumer demands and in giving the ability of multiple suppliers to compete to meet that demand. Recognizing that it is the consumer that owns the historical information on demand for and uses of power will also respect the consumers' right to privacy.

In this same area, Congress should address the free movement of goods, capital and services in the retail electricity market. As such Congress must establish standard terms and conditions for the interface perhaps by empowering NERC to coordinate minimum market standards. Finally, the customer information channel—the metering and billing of sales—must be open to competition. Reliability problems are as much a function of inadequate demand-side information and response as they are about the need for new generation.

#### *Environmental Programs and Labeling Should Not Burden Interstate Commerce*

One additional barrier warrants our attention. This barrier is not one that grows out of the power industry's past such as the exclusive monopoly franchise, the discriminatory rules for accessing the grid, the commercially hostile reliability rules, and the unequal access to information on consumer demand and consumption. Rather, this barrier is emerging today with the advent of competition. Potentially an impediment to competition is the wellintentioned effort of some state regulators and lawmakers to achieve new restrictions on power plant emissions by labeling all delivered electrons to show the fuel from which they were generated—e.g., coal, nuclear, hydroelectric, wind, geothermal, solar.

If a power supplier consciously markets its product to consumers in terms of its emissions or lack thereof, surely it should be held accountable for substantiating its

claims, irrespective of how burdensome that may be. However, a pro-market approach taken in California allows a generator to receive an identifying "certificate" for its output, showing, for example, that it uses 50 percent wind generation and 50 percent hydroelectric. That certificate can be sold to downstream marketers that represent to consumers that their power is not generated with fossil fuels. Ultimately, certificates of the California type or tradable credits for renewable energy generation could be used by power retailers to demonstrate compliance with a renewable portfolio standard, such as proposed by the Administration. In any event, whether it be the Administration's labeling or their renewable portfolio standard sections, Congress must enable a unified market rather than an ineffective and costly patchwork of state programs. States could choose to waive into these programs in lieu of mandates.

If an accounting system is devised for tracing electrons back to their generation it will inevitably be complex, produce a lot of accounting entries and paperwork, and be of questionable accuracy. In the emerging power market, like other commodity markets, the product changes hands multiple times. Any attempt to trace a unit of power in this type of market will only make power more expensive. A certificate market will address labeling requirements while tracing molecules will shut the market down.

Competitive markets provide the best opportunity for marketers to sell renewable products directly to consumers, based on the merits of these products. As we transition to full competition, however, it makes no sense to abandon our commitment to the environment and renewable energy sources. Especially during this transition, a public policy to support renewables through programs such as tax credits or perhaps a modest Renewable Portfolio Standard is appropriate.

#### *Federal Statute Updates*

In addition, we recognize and support the need for Congress to address the Private Use issue in the context of comprehensive legislation (HR 721). We further support PUHCA repeal in the context of comprehensive legislation. Further, we have concerns that HR 2363 creates unneeded regulatory oversight of affiliated companies that have no need for additional regulation on their books and records. Enron supports the Congressmen Largent/Markey approach on PUHCA as applying to existing retail monopolies in a two or more state service territory.

#### *Conclusion*

Enron and EPSA are very appreciative of this opportunity to share with the Subcommittee our experiences with competitive power supply and to discuss our efforts to promote competition in power markets. To summarize, enormous consumer benefits can be achieved through removing the historical barriers to competition erected by the exclusive franchise, discriminatory restrictions on transmission access, and commercially hostile and unnecessary reliability rules. There are also emerging new barriers to interstate commerce in electric power that should be prevented in the first place by asserting the interstate commerce clause. In sum, we are not advocating re-regulation, rather we advocate deregulation of all competitive aspects of the industry with appropriate regulation and enforcement of the monopoly interstate transmission network. Today, the system is broken. I urge you to move legislation as a "must do" matter for this Congress.

Mr. BARTON. Thank you. Largent-Markey is now in the lead. We give you bonus points for pronouncing "byzentine." That was an excellent use of that word. We would now like to hear from Mr. Alan Richardson, who is representing the American Public Power Association, which I assume are the municipally owned.

#### **STATEMENT OF ALAN J. RICHARDSON**

Mr. RICHARDSON. That is correct, Mr. Chairman.

My name is Alan Richardson. I am representing the American Public Power Association.

Mr. BARTON. Pull that microphone up to you, Mr. Richardson.

Mr. RICHARDSON. Yes, I will. Thank you.

Thank you for the opportunity to appear here today. Thank you for the time and attention that you, personally, have taken in dealing with this issue and your colleagues. You are extremely well-informed. That is very comforting. While we do not always agree on



the issues, it is nice to know that we are dealing with individuals who have taken a lot of time to address these issues in a very serious fashion. We really appreciate that.

Mr. BARTON. We are not going to take that away from your time. We are going to start your clock again.

Mr. RICHARDSON. Thank you very much, Mr. Chairman.

Mr. BARTON. Since you said something nice about the chairman, we are going to start it again.

Mr. RICHARDSON. When I testified before this committee a couple of years ago, Mr. Chairman, I stated at that time that we supported the enactment of comprehensive restructuring legislation that benefited all consumers and addressed a couple of critical issues; specifically market structure and private use. That was our position 2 years ago. It remains our position today.

We were concerned 2 years ago with the issue of Federal mandate. We think that members of this committee, particularly its chairman, demonstrated great leadership then in pushing for a Federal mandate because the end result was to push States forward in a more rapid fashion than would otherwise have occurred.

We are confident, however, now that the chairman has concluded that he does not believe that a date-certain mandate is necessary, in light of what has happened in the States. We support that because we do, and continue, to oppose either a Federal mandate or the mandate option of the administration's legislation.

I would like to focus on a couple of issues in the couple of moments that I have here. These are market power and private use. Congress, we believe, has an extremely important role to play in protecting all consumers from abuses of market power. We disagree with those who suggest that we should simply let the market determine its future.

There are cases where the market can determine the future of the marketplace. This happens in truly competitive markets where the beneficial forces of robust competition can and do create real opportunities for buyers and sellers to interact. Unfortunately, this is not the case in the electric utility industry, as it currently exists. It is a vertically integrated monopoly.

Now for some, the idea of competition is a rather illusive concept. So, I would like to offer a definition presented by John Morris Clark, an economist. He said, "Competition is rivalry in selling goods in which each selling unit seeks maximum revenue under conditions such that the price or prices each seller can charge are effectively limited by the free option of the buyer to buy from a rival seller or sellers of what we think of as the same product, necessitating an effort by each seller to equal or exceed the attractiveness of the other's offerings through a sufficient number of sellers to accomplish the end." They are a lot of words from an economist and a little difficult to parse. Basically, this definition focuses on the critical point of competition, and that is the nature of the options that are open to buyers. There is evidence today that the options for buyers are insufficient to, in this economist's words, "force each seller to equal or exceed the attractiveness of others' offerings." In this regard we believe, Mr. Chairman, that there are a number of market power issues that need to be addressed in legislation. The administration has proposed to deal with market

power issues as has the Largent-Markey bill. There are elements of both that we are supportive of.

In our view, restructuring legislation must include issues such as enhanced FERC merger authority, protections against generation market power, truly neutral independent management of our Nation's transmission facilities, and the repeal of the Public Utility Holding Company Act, only in the context of comprehensive restructuring legislation that recognizes the interrelatedness of the Holding Company Act and the Federal Power Act, and carries forward consumer protection provisions otherwise addressed in the Holding Company Act itself. So, we oppose stand-alone repeal.

With respect to private use, public land utilities have financed their transmission generation distribution facilities with tax exempt bonds and are now encountering significant problems in reconciling the old private use tax laws with the new dynamics of the marketplace in 22 States, and the dynamics of marketplace that we anticipate developing in the remainder of the States in the relatively near future.

These tax code provisions are out of sync with State restructuring legislation. The private use limits of the Federal tax cut are impediments to competition. As long as they remain in effect, many public power systems will not be able to open their systems to competition. Only Congress can address this problem.

The problem should be addressed in a fair and reasonable fashion that respects the rights of State and local governments. It should provide an opportunity for those public power systems that have this problem with a way to resolve it without penalizing those that do not have this problem.

We believe this is exactly the approach that is taken in H.R. 721 and incorporate it in H.R. 2050. This legislation, if enacted, accomplishes two objectives. It clarifies existing tax laws, and it encourages public power systems to open their utilities to competition.

We believe this is a fair and equitable resolution of the dilemma facing public power and we hope it will be included in any comprehensive legislation that comes out of this committee.

There are a number of other issues, of course, Mr. Chairman that I have not addressed here. They are included, I think, in detail in my prepared comments. I appreciate again the opportunity to testify. Thank you very much.

[The prepared statement of Alan J. Richardson follows:]

PREPARED STATEMENT OF ALAN H. RICHARDSON, EXECUTIVE DIRECTOR, AMERICAN  
PUBLIC POWER ASSOCIATION

#### INTRODUCTION

Good Morning, Mr. Chairman and members of the subcommittee. Thank you for the opportunity to testify today on electric utility industry restructuring legislation. APPA is the national service organization representing the interests of over 2,000 municipal and other state and local government-owned utilities throughout the U.S. While APPA member utilities include state public power agencies, and serve many of the nation's largest cities, the majority of our members are located in small and medium-sized communities in 49 states. In fact, 75% of our members are located in cities with populations of 10,000 or less. APPA member utilities provide about fourteen percent of all kilowatt-hour sales to ultimate consumers in the U.S. and collectively serve more than 40 million Americans.

Mr. Chairman, I am pleased to be here today to discuss public power's views regarding federal electricity industry restructuring legislation, and as well, to provide

our thoughts regarding the related legislation before the subcommittee. In addition to our testimony today regarding these measures, I have attached copies of other APPA material that outlines our official positions regarding industry restructuring, as well as other items that address specific issues that we believe should be included in restructuring legislation.

Because APPA represents consumer-owned utility systems, our restructuring policies focus solidly on the goal of promoting federal action that complements state retail choice plans in order to ensure that all consumers have an opportunity to enjoy the benefits of competition. In fact, public power has a long history of support for increased competition in the electricity industry. We were a primary force behind the transmission access provisions of the Energy Policy Act of 1992, and have been working closely with the Federal Energy Regulatory Commission (FERC) and others to foster the conditions needed for effective competition in wholesale electricity markets.

Our leadership in the drive toward competition is no coincidence. Public power has existed in a competitive environment from the very beginning of the electric industry. In public power communities throughout the country, the very future of the electric utility is always a ballot box issue that can be put to the test by local voters in the next election.

As the committee proceeds with its consideration of restructuring legislation for retail competition, we urge you, first and foremost, to ensure that federal policies preserve the rights of states and local governments to make their own decisions about restructuring based on their knowledge of their own electricity needs. We believe the aim of federal legislation should be to facilitate state decisions to implement retail competition by addressing issues that are necessary for retail competition to work, but which cannot be completely resolved by a single state or even a group of states.

Mr. Chairman, APPA strongly supports the goal of increasing competition in the industry. But we face a difficult task of establishing an industry structure that will promote and enhance competition to ensure that the promised benefits of competition, advancing the interests of all consumers, including, of course, those served by public power, will be achieved.

APPA has consistently supported comprehensive federal restructuring legislation. There are certain issues that can only be addressed by Congress, such as effective means of controlling or preventing market power and reconciling jurisdictional conflicts between the states and the Federal Energy Regulatory Commission. A comprehensive approach is essential because there are a number of interrelated issues involved in restructuring that need to be considered simultaneously. Consumers can and should benefit from a more competitive electric utility industry. However, we believe that any federal policy intended to foster competition in the electric utility industry will fail if it does not provide a foundation upon which competition can be developed and sustained. To achieve this goal, we believe Congress must address a number of critical issues.

You have asked us to provide you with our views with respect to eight bills dealing in one way or another with restructuring. Specific comments on these bills are included as part of our statement. At the outset, however, I would like to provide a summary of those issues most important to the community owned utilities that we represent. These include: market power; private use; reliability; aggregation; and matters relating to the Federal power marketing administrations and the Tennessee Valley Authority.

#### *Market Power*

The key ingredients for effective competition in any market include the existence of many buyers and sellers, freedom of entry and exit for competitors, and transparent access to market information. Market power can frustrate—even prevent—the achievement of this desired end state.

Yet, high levels of market power are exactly what we have in our industry today. The electric utility industry in the United States is dominated by vertically integrated, regulated monopolies, with approximately 80% of our nation's generation resources controlled by incumbent utilities and their affiliates. These same incumbents also own about 70% of transmission lines of 138 kV or greater. (The Tennessee Valley Authority, and Bonneville, Western Area and Southwestern Power Administrations collectively own about 15 percent of transmission at voltages of 138 kV or above. Approximately 100 public power systems own about 8 percent of transmission lines of 138kV or greater. The balance is owned by rural electric cooperatives.) Vertical integration, high levels of concentration in generation markets and simultaneous regulated and unregulated activities provide a myriad of opportunities for anti-competitive market abuses. (Indeed, FERC Orders 888 and 889 are pre-

mised on the finding that these private power companies had engaged in discriminatory practices, and that such practices could only be addressed through open access transmission requirements.)

Some have said that Congress and regulators should let the market determine its future structure. There are cases where the market in fact can discipline the marketplace—creating real opportunities for buyers and sellers to interact, with no barriers to entry into the market, and with market information available to all actual and potential participants. Unfortunately, this is not the case in the electric utility industry. The proposed conversion from regulated monopoly service of power supply to a truly competitive market is starting from a situation where a few players have control over both generation and transmission assets. Each can be used to enhance the value of the other. If Congress decides to remove all constraints on these dominant market participants, the market won't determine its future—the current monopolists will.

This is what most concerns APPA. Effective and efficient competitive markets do not require heavy regulatory or anti-trust scrutiny. But we do not now have an effective and efficient market in electricity. It is up to Congress to help structure the market to ensure that we don't end up with a situation that simply substitutes unregulated for regulated monopolies.

Some states have taken steps to address market power within their borders. For example, the State of Texas has adopted restructuring legislation that takes an important step toward addressing generation market power by mandating that a power generation company cannot own and control more than 20 percent of the installed generation capacity within a qualifying power region. However, the ability of the states to adequately address market power is limited because:

- Power markets are regional, spanning multiple states;
- State commissions and legislatures lack jurisdiction over out-of-state market participants, and;
- Once states implement retail competition, generation assets are no longer rate-based and subject to state commission jurisdiction.

The experience of California underscores these points:

- When restructuring legislation was passed, it was recognized that most market power issues would be addressed at the federal level;
- State law created the California Independent System Operator, but it is FERC that approves and regulates the entity—not the public utility commission or the legislature
- When prices for ancillary services spiked 3500% last July, it was FERC—not the public utility commission—that had sole authority to take remedial steps.

Federal legislation must address this critical issue by instituting new structural protections against market power abuses. While a number of market power protections are needed in federal legislation, let me highlight the areas of primary importance. These include: 1) Enhanced FERC merger review authority; 2) Protections against generation market power; 3) Truly neutral, independent management of our nation's transmission facilities, and; 4) Repeal of the Public Utility Holding Company Act (PUHCA) only in the context of comprehensive restructuring legislation that recognizes the interrelatedness of PUHCA and the Federal Power Act. Let me take a moment to discuss these four important areas.

*Enhanced Merger Review Authority:* Concentration in ownership of electric resources in this country is increasing at an unprecedented rate as today's utilities engage in mergers to assure themselves a strong position in a competitive marketplace. The rapid pace of this trend toward consolidation is clear—since 1997, 33 mergers were proposed, and 22 completed. In contrast, only nine were proposed during the three years prior to that, 1994-1996.

While mergers are frequently touted as a means of preparing for competition, in many if not most cases they are a defense against competition. Today's mergermania is in direct conflict with the objective of creating competitive generation markets out of a highly concentrated industry. If competition is the goal, then proposed mergers must be evaluated to ensure that they don't in fact preclude the realization of that goal. Toward that end, newly proposed mergers should be denied, unless it is clearly demonstrated that the benefits for consumers are not otherwise obtainable. Clearly there are benefits from some mergers, but there are detriments as well, including the fact that every merger eliminates at least one competitor from the market. Where significant concentration in ownership of generation already exists without a merger, FERC should have authority to reject the proposed merger. In addition, FERC should have the authority to require divestiture as a last resort remedy to prevent or correct market power problems.

Early last year, Joel Klein, Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, addressed concerns about the impact of the increasing trend toward mergers in a presentation before FERC. He noted that, "...utilities may see this as a time when they have a window of opportunity in which to consummate mergers. Mergers with little immediate anticompetitive effect can nonetheless frustrate the emergence of competition. For example, incumbent dominant firms could pick off competitors in their infancy, or even before they become competitors. . . . Missed opportunities for the emergence of competition at the outset of the transition are forever lost, with potentially substantial social costs."

Because it is difficult at times to project what the impacts of today's decisions will be on an unknown and still-developing future market structure, APPA has suggested that a temporary moratorium on the largest electric mergers may be in order. In the absence of such a moratorium, it is important at a minimum to recognize that today's merger decisions are integrally related to the goal of competitive markets—and that FERC's merger review process must begin to take this fact into account by fully examining the effect of proposed mergers on competition.

*Generation Market Power:* While enhanced merger review authority is designed to address further concentration of control of the nation's electric generation resources—much must also be done to address the existing control over generation that is now largely in the hands of a relatively small number of privately-owned utilities.

State policies that restrict the amount of generation that can be owned by a single corporate entity are a very important step in the right direction—but the next step has to be to ensure that the company that purchases the generation, a company located over state lines for example—does not then exercise the generation market power that the state statute was designed to guard against. Simply transferring ownership from one entity to another does not do enough to achieve the goal of a less concentrated market that is more conducive to effective competition. Because electricity markets are regional, state restrictions on the ownership of generation have limited effectiveness.

Clearly, those who control the market today will seek to maintain their control at the expense of potential competitors. If our goal is a truly competitive marketplace, the face of today's monopolistic industry has to change. That is why there must be strong structural remedies to guard against both new *and existing* market concentration. This includes FERC authority to intervene where market power develops, and if needed, cause the corporate separation of generation from for-profit transmission companies. In addition, FERC should be able to prevent increased concentration in power markets when generators are sold by one utility and acquired by another. Without rigorous oversight—and divestiture authority as a last resort—market power abuses will choke competition before it can get a toehold in this industry. Again, because these markets are regional in nature, *federal* regulatory involvement is needed to protect consumers from the anticompetitive effects of market concentration throughout each region.

*Neutral, Independent Management of Transmission Facilities:* In addition to taking such steps to guard against market power in generation, we must also concentrate on the important goal of ensuring that our nation's transmission facilities are operated on a truly neutral basis. The development of broad-based independent Regional Transmission Organizations (RTOs) will be critical in this regard.

Private utilities that control vast amounts of the nation's transmission systems have a long history of denying municipal utilities access to their systems, or providing access at highly discriminatory rates and unfair terms. Despite congressional and regulatory actions to open up the nation's transmission grid and produce a competitive bulk power market through enactment of the Energy Policy Act of 1992 and the issuance of FERC Orders 888 and 889, private transmission owners continue to control essential transmission facilities in ways designed to frustrate competition. They are able to exercise control over these facilities to favor their own generation resources, placing power generators and bulk power purchasers, including consumer-owned utilities, at a competitive disadvantage.

One of the lessons of the Energy Policy Act is that the only way to ensure that the nation's transmission assets are managed in a way that facilitates the development of retail competition is to ensure that the entire transmission system is in the hands of truly neutral entities that will treat all competitors the same. Achieving this end will require enabling FERC to mandate that all transmission owners participate in an independent RTO, and beyond that, to mandate divestiture of transmission from generation if necessary. In fact, the Federal Trade Commission has proposed the latter to FERC, suggesting that transmission operations be separated from ownership of generating plants in order to eliminate the incentives that exist

for transmission owners to favor their own economic interests and evade regulatory constraints.

It is important to note that APPA does not support the development of private, investor-owned utility (IOU) *affiliated* or *controlled* Transcos as an answer to these problems. Despite the arguments advanced for private, for-profit, Transcos either affiliated or otherwise controlled by IOU generators, they will not achieve the desired end of a truly competitive, economically efficient, lower cost, fair and open transmission grid, and should be rejected. They will not be truly competitive because they will lack the requisite independence from the parent corporation. They will not be economically efficient because they will not encompass a sufficiently broad geographic area. And, they will not produce a fair and open transmission grid because they will not incorporate the transmission facilities of publicly owned and consumer-owned utilities.

We could support large, private, and investor-owned Transcos that have no affiliation—absolutely none—with generation and marketing interests. However, even these truly independent Transcos would be natural monopolies that must be overseen by FERC to prevent transmission market power abuses. A better option, in our view, would be publicly owned not-for-profit, regional transmission organizations.

*Opposition to Stand-Alone PUHCA Repeal:* Lastly, in regard to market power, let me emphasize the importance of ensuring that changes in the Public Utility Holding Company Act (PUHCA) are undertaken only in the context of broader changes in the Federal Power Act. We strongly believe that future repeal of PUHCA must take place only in the context of a comprehensive electricity industry restructuring bill. PUHCA was enacted as a companion to the Federal Power Act in 1935 to, among other things, plug regulatory gaps created by multi-state holding companies that had—and still have—the ability and incentive to not only manipulate their books, but engage in activities that favor affiliate or subsidiary companies to the disadvantage of their competitors, and the ultimate disadvantage of all consumers. Because of the interrelatedness of these statutes—any legislation regarding PUHCA should be fully coordinated with changes in the Federal Power Act to protect consumers.

Stand-alone repeal of the consumer protections afforded by PUHCA will unleash today's vast multi-state holding companies from public accountability before the structure of a competitive market is developed. It will enable today's monopolies to garner even greater amounts of market power through mergers and widespread diversification, and the existence of such significant concentrations of market power is sure to inhibit, if not prevent, the advent of structural competition in the electricity industry.

In addition, stand-alone PUHCA repeal presents unacceptable risks for captive electric consumers who do not have alternative service options if their utility's diversification efforts fail, or worse, non-regulated ventures are subsidized with captive ratepayer funds, and they are left to pay the price.

While many argue that PUHCA is an imperfect and perhaps outdated statute that is in need of reform, it is clear that the statute's goals of preventing market power abuses and harmful utility interaffiliate and diversification activities have great relevance to developing markets today. Even though the statute is ineffectively enforced by the Securities and Exchange Commission (SEC), it still provides valuable passive restraints on the formation of holding companies that extend the effect of the law far beyond the registered multi-state holding companies that now fall under its direct purview.

Public power interests have been integrally involved in the activities of the Consumers for Fair Competition, a coalition of small business interests, power marketers, consumer and investor-owned utilities, large industrial electricity consumers, environmental organizations and consumer groups that is unified in the belief that effective competition will not emerge and be sustainable if market power issues are not adequately addressed. Consumers for Fair Competition has developed proposed market power legislative language (please see attached), and we look forward to serving as a resource to you in this regard.

#### *Reconciling Conflicts Between Existing Tax Laws and Changes in State and Federal Energy Policy*

Twenty-three states have now adopted restructuring legislation. Many other states will follow in the near future. These new laws, and the "open access" policies they seek to promote, have created an extremely serious problem for communities served by public power systems that have issued tax-exempt debt to finance their local electric utility infrastructure. If these community-owned electric utilities take steps to conform their operations to these new state policies, they are immediately confronted with the nearly insurmountable obstacle of Federal tax code private use restrictions. In most cases, implementation of state restructuring plans—and even

FERC policies designed to provide open transmission access for competitive wholesale markets—will jeopardize the financial standing of these public power communities and millions of bondholders across the U.S. Specifically, if municipal utilities enter the competitive arena and violate private-use restrictions, their outstanding tax-exempt bonds could become retroactively taxable to the date of issuance.

APPA supports a solution spearheaded by Representatives J.D. Hayworth and Bob Matsui—the Bond Fairness and Protection Act (H.R. 721)—that would preserve local decisionmaking about how to use tax-exempt bonding authority. It would allow each public power system to “elect” to obtain relief from private use limits, but forego the right to issue municipal tax-exempt bonds for new generation facilities in the future. If enacted, this legislation will accomplish two objectives: 1) Clarify existing tax laws and regulations regarding the private use rules so that they will work in a new competitive marketplace, and; 2) Provide encouragement for public power utilities to open their transmission or distribution systems, thereby providing choice to more consumers. This bipartisan bill has gained strong support in the Senate, where it has 26 co-sponsors. Companion House legislation has 60 co-sponsors. In addition, the provisions of H.R. 721 were recently incorporated in the Largert-Markey bill, H.R. 2050.

Congressional action in this area is urgently needed—existing wholesale markets cannot function effectively, and state restructuring plans cannot be fully implemented, without public power’s full participation. The private use restrictions not only hamstring the ability of public power utilities to ensure that their communities receive the benefits that effective competition can provide, but also negatively impact the underlying market.

Assurance of a fair and reasonable resolution of this problem, a resolution that respects the inherent rights of the units of local government we represent, is an essential element in federal restructuring legislation. APPA could not support any restructuring legislation that did not include such an assurance.

#### *Reliability*

The reliability of the integrated and interdependent electric system is extremely important to health and safety and the viability of our economy. In the monopoly paradigm of the past, reliability has been protected by mutual back-up arrangements among utilities, and a regional reliability council structure. However, this system of cooperation and mutual assistance lacks both clearly enforceable rules and sanctions as well as competitively neutral entities to determine and enforce the rules on a non-discriminatory basis. This voluntary approach to reliability will not work in an increasingly competitive market. Reliability rules and their enforcement can have significant competitive impacts, and it is essential that reliability be maintained and enhanced in the transition to competitive markets.

APPA supports the North American Electric Reliability Organization (NAERO) Consensus Legislative Language on Reliability, which will create a self-regulating reliability organization that would be overseen by FERC. The mission of this new organization would be to ensure that reliability rules are applied equally to all electricity providers. APPA urges this committee to incorporate this language in its comprehensive restructuring legislation.

#### *Encourage Consumer Benefits Through Aggregation*

Federal legislation should provide for customer aggregation to assure that small business and residential consumers can derive maximum benefits from a competitive market. We believe the jury is still out on whether residential and small business consumers will benefit financially from restructuring, or even are of interest to many marketers. Aggregation provides these customers with an important tool that can help strengthen their position in an emerging competitive marketplace—and state and local governments are well positioned to play key roles as consumer aggregators. Federal restructuring legislation should emphasize the importance of aggregation, and explicitly allow state and local governments to serve as aggregators in an effort to garner lower electricity prices for the consumers they represent.

#### *Federal Power Marketing Administrations and the Tennessee Valley Authority*

APPA recently testified before the House Interior Committee’s subcommittee on water and power regarding the role of the federal power-marketing program in a restructuring environment. A copy of the testimony presented before that subcommittee is attached.

The debate on industry restructuring has resurrected the decades old debates over the federal power marketing program and the Tennessee Valley Authority. As explained in detail in the statement provided to the Interior Committee’s sub-

committee on water and power, we oppose fundamental changes in these programs for the following reasons:

- Withdrawing Federal power allocations to the 1180 public power and rural electric cooperative systems that currently purchase power from these federal entities would undermine their financial stability. Some would become more vulnerable to hostile acquisitions. The Congressional goal of enhancing competition in the electric utility industry would suffer, since removing a substantial number of these utilities from the market would reduce the number of active market participants. The marketplace today requires more, not fewer, participants to prosper.
- Accepting the assumption that market rates would exceed current Federal power cost-based rates, converting TVA and PMA sales from cost-based to market-based rates would likewise make it more difficult for the current public power and cooperative power systems to survive this difficult transition from regulated monopolies to robust competition.
- The continuation of cost-based rates for sales of power from TVA and the PMAs provides a valuable yardstick by which regulators, legislators and others can compare the performance and price of market participants in a new, restructured, environment.
- The goal of restructuring is lower rates for all consumers. Conversion of TVA and PMA rates from cost-based to market based would increase the cost to consumers of 1180 mostly small, rural communities. The Administration's proposal postulates that all consumers will benefit from restructuring, but only if the Federal power marketing program, including current power allocation policies and cost-based rates, are preserved. Change this assumption through the adoption of legislation to charge market rates for federal power and millions of Americans would experience higher, not lower, rates for electric service.
- Requiring the Administrator's of the Federal power marketing administrations or the Board of TVA to charge market rates, and devote any profits in excess of costs to specific, Congressionally identified programs, would convert these entities into de facto taxing entities, and would have an adverse effect on their management of publicly-owned resources.
- The Congressional debates on restructuring are already extremely complex, and fraught with political pitfalls. Throwing Federal power marketing policies into this mix further complicates an extremely difficult political equation. APPA would be forced to oppose Federal restructuring legislation that proposes fundamental changes in these power allocation and cost-based rate policies.

Other TVA and PMA related issues have been addressed in legislation pending before this committee, including H.R. 1828 and H.R.2050. The provisions in these bills deal with such issues as the application of the Federal Power Act to TVA and PMA transmission facilities, application of the antitrust laws to these federal entities, and stranded cost recovery.

APPA does not represent TVA or the PMAs, but how these agencies are treated will certainly affect the several hundred public power systems that purchase wholesale power from them for sale at retail to consumers in their communities. Stakeholders in the areas served by TVA and the PMAs have been working with their own Congressional delegations and the Administration to develop policies that address their needs and concerns. APPA urges this Committee to allow their colleagues from the regions served by these agencies to take the lead in developing restructuring proposals.

#### *FERC Jurisdiction over Publicly Owned Transmission Facilities*

APPA is concerned over proposals in several pending bills to expand the jurisdiction over rates, terms and conditions of transmission service to non-jurisdictional utilities. APPA does support changes in the Federal Power Act to enable FERC to require all transmitting utilities to participate in Regional Transmission Organizations. We believe such a provision adequately addresses whatever concerns might exist with respect to the use of transmission facilities of non-jurisdictional utilities.

Expanding FERC jurisdiction over currently non-jurisdictional public power owners of transmission lines of 138 kV or greater would bring under FERC authority nearly 100 public power systems. Collectively, these utilities own about 18,000 miles of transmission, representing slightly less than 8% of the nation's transmission system. The total amount of transmission owned by these 100 public power systems is less than the transmission assets of two of the largest investor owned utilities—Texas Utilities and PacifiCorp. These two utilities alone own over 21,100 miles of transmission facilities of 138 kV or higher.

We do not believe a case has been made for the expansion of FERC jurisdiction over publicly owned transmission facilities (beyond the ability of FERC to order all



transmitting utilities to participate in RTOs). There has been no demonstration, for example, that public power systems have engaged in discriminatory or anti-competitive practices. In contrast, such practices by the investor owned utilities are well documented. Expanded jurisdiction as proposed will increase the regulatory burdens on both FERC and these 100 public power systems without producing any real benefits for consumers or the general public interest.

Finally, it is important to recognize that FERC already has jurisdiction under provisions of the Energy Policy Act of 1992 to order, on a case-by-case basis, publicly owned utility transmission owners to provide access to third parties. While publicly owned utilities are not directly covered by FERC Orders 888 and 889, most of these utilities with substantial transmission assets have voluntarily filed open access tariffs. The fact that no complaints have been lodged or cases filed against public power transmission owners pursuant to the provisions of the Energy Policy Act of 1992 is further evidence that expanding FERC jurisdiction is unwarranted.

Despite all of these facts, it is apparent that many Members of Congress and the Administration believe that expanding FERC jurisdiction over public power transmission facilities is in the public interest. WE are willing to work with this subcommittee and other Members of Congress to better understand the goals sought to be achieved and the least intrusive and burdensome means of achieving them.

#### *Public Power's Views on Pending Restructuring Proposals*

With the preceding comments as background, there follows APPA specific comments on the eight restructuring bills that are the subject of this legislative hearing.

#### **H.R. 667, The Power Bill**

H.R. 667 is a relatively basic restructuring bill that would remove some federal barriers to retail competition but not mandate competition by a date certain, both actions that APPA supports. The measure eliminates the Federal Energy Regulatory Commission's authority over mergers. We believe FERC's authority in this area should be expanded, not eliminated. The bill also proposes to repeal PUHCA, but does not provide any alternatives to the current provisions of PUHCA that we believe are essential to protect consumers from abuses of market power. As far as the treatment of public power, the bill preserves the opportunity for local choice in determining whether and when municipal systems decide to engage in a competitive marketplace, which APPA endorses.

#### **H.R. 971, Electric Power Consumer Rate Relief Act of 1999 and H.R. 1138, Ratepayer Protection Act**

APPA does not have a specific policy resolution regarding the prospective repeal of the mandatory purchase requirements of PURPA, which is the primary objective of these bills. However, it is apparent that changing market conditions indicate that repeal of Section 210 of PURPA is necessary. It is of vital importance, in our view, that any changes in this regard must be made only as part of comprehensive industry restructuring legislation that furthers PURPA's original purposes regarding the growth and development of renewable energy resources.

#### **H.R. 1486, Power Marketing Administration Reform Act of 1999**

For the reasons set forth above, APPA opposes H.R.1486.

#### **H.R. 1587, Electric Energy Empowerment Act of 1999**

For many of the reasons stated previously, APPA supports the general direction of H.R. 1587. It does not impose a federal mandate, it removes federal barriers to competition and it empowers the states to make many of the specific decisions related to restructuring. There are, however, new proposals related to FERC jurisdiction over public power that we oppose, given that there is no reason to change the regulatory status of public power, nor has any state attempted to change the regulatory relationship with public power in their own state restructuring bills. In addition, the bill does not, in our view, include sufficient protections against abuses of market power and does not include the industry consensus reliability language that we believe must be included in any comprehensive restructuring legislation.

#### **H.R. 1828, Comprehensive Electricity Competition Act of 1999**

Because the Administration's restructuring proposal, H.R.1828, is, in most respects similar to the proposal advanced in 1998, we have had more time to analyze its provisions than we have had for many of the more recently introduced comprehensive bills. Consequently, our positions with respect to this measure are more clearly defined. Last year, APPA adopted a resolution addressing the Administration's proposal. A copy of that resolution is attached to this statement. APPA believes this proposal goes a long way toward addressing the key objectives of elec-

tricity industry restructuring. I would like to highlight for the committee what we see as some of the strengths of the bill, and note for you some of the issue areas where we believe additional attention are needed.

First, let me comment on the bill's flexible mandate under which all states and self-regulated utilities must decide whether or not to deregulate their operations by January 1, 2002. While a flexible mandate is better than an inflexible one, no mandate at all is better yet. APPA has consistently opposed any restructuring mandate. We applaud Chairman Bliley's comments a few weeks ago that he no longer believes a mandate is appropriate, given the rapid pace of state restructuring legislation. In light of those comments, we hope the issue of a mandate is now off the table and we can focus on other, more pressing, restructuring issues.

With regard to market power, the Administration has also included in its bill some important provisions designed to prevent market power abuses. In particular, H.R.1828 expands FERC's merger review authority to account for potential impacts of proposed mergers on the status of competition in wholesale and retail electricity markets. This provision is necessary to ensure that existing levels of market power in the industry do not inhibit the development of truly competitive markets.

In addition, the bill is designed to guard against transmission market power abuses by enabling FERC to require transmitting utilities to turn over operational control of transmission facilities to an independent transmission organization which would also be vested with transmission planning authority. As a sector of the industry that has long been subject to abusive transmission practices, we believe strongly that any federal legislation must contain such provisions to ensure transmission is available and provided on a truly neutral basis to all competitors.

While the legislation includes several necessary market power protections, we believe that FERC's authority to intervene in cases where market power exists must be more direct than is provided for under H.R. 1828. Requiring that FERC take action to mitigate market power in certain circumstances only at the request of states will result in costly delays and duplicative review. Because electricity markets are regional in nature, FERC is best positioned to identify the existence of market power and take immediate remedial action—in many cases, by the time state action can effectively trigger a federal response, prices will have already gone up for consumers, potential competitors will have been harmed and the goal of competition compromised.

It is important to note that we are highly supportive of the authority H.R. 1828 would grant FERC to order divestiture or control of generation assets as a last resort to mitigate the adverse competitive effects of market power. We believe such authority is essential, and should be included in any restructuring legislation. We recognize that this is viewed by some as an extremely heavy-handed regulatory intrusion into the market. However, as stated previously, we are attempting to introduce robust competition into a highly concentrated, vertically integrated industry. Divestiture, as a "last resort" remedy, essentially a club in the closet, is a necessary tool that should be provided to ensure the success of this transition. Further, we believe FERC should be able to initiate such proceedings, and should not be dependent on state applications for intervention.

H.R. 1828 would provide slightly over a year for implementation of structural market power protections prior to repeal of the Public Utility Holding Company Act (PUHCA). APPA agrees that structural market power protections must be deployed in advance of PUHCA repeal in order to protect consumers from market power abuses, and to ensure that competitive markets are given a meaningful chance to develop. We also support strong provisions to require state and federal access to books and records of holding companies to ensure that consumers are protected against the effects of cross-subsidization and abusive interaffiliate transactions.

I would also like to comment on the tax-related portion of the Administration's bill. It is our view that the Bond Fairness and Protection Act H.R. 721 offers a preferable approach to addressing the private-use tax issues that inhibit the ability of municipal utilities to fully participate in a restructured electricity industry. While the Administration's proposal is commendable in that it grandfathers outstanding tax-exempt debt and protects bondholders, it has two significant shortcomings. First, it provides no element of choice. All public power systems would lose the ability to issue tax-exempt bonds regardless of whether they faced private-use problems. This approach would represent a virtually unprecedented restriction on the ability of states and localities to use tax-exempt financing for facilities that did not necessarily violate private-use restrictions. Second, we find little justification for eliminating tax-exempt financing for transmission facilities. It is unlikely that competitive pressures will affect transmission services in the foreseeable future. The benefits of bond-financed transmission facilities accrue to all electricity market partici-

pants: states and localities, investor-owned utilities, power marketers and, most important, consumers.

Ultimately, requiring all utilities to forego future tax-exempt financing would force many municipal systems to give up an essential tool of municipal government for no tangible gain. In addition, a wide array of local government groups would strongly oppose the mandated denial of tax-exempt financing for what is a legitimate governmental function. H.R. 721 is preferable in this regard in that it will allow each local utility to determine which policy option is better for that community.

H.R. 1828 also deals with another "tax transition" issue—the tax treatment of contributions to nuclear decommissioning funds by investor owned utilities. We believe all these tax transition issues should be handled together. Investor owned utilities, who want tax code changes with respect to nuclear decommissioning matters so that they reconcile the tax code to changes in state law, are simultaneously opposing the tax code changes needed by public power for precisely the same reason. We applaud Chairman Bliley's request that the Ways and Means Committee handles these issues simultaneously. Unfortunately, the tax bill now pending before the House addresses nuclear decommissioning but does not address private use. We hope, as the process proceeds, a way will be found to deal with both of these issues together.

Let me briefly touch on a few other areas of H.R. 1828 that relate to public power's restructuring objectives. First, we appreciate that the Administration recognizes the need to provide specific treatment of issues related to the Bonneville Power Administration, the Tennessee Valley Authority and the other federal power marketing administrations. We believe that any proposals in this regard must honor the traditional objectives and responsibilities of the power marketing administrations as they play an important role in maintaining market diversity and help further the goals of competition by ensuring affordable electric rates for millions of consumers.

We are also pleased that the bill allows for aggregation of electricity consumers to ensure they have the means to achieve the lowest possible electricity rates. In addition, we support the Administration's general inclusion of the industry consensus reliability language as developed through NAERO. APPA actively participated in the development of the NAERO reliability proposal, and believes it should serve as a cornerstone for any federal restructuring legislation.

Finally, let me note that APPA would encourage the committee to consider any air quality issues stemming from the restructuring debate in the context of the Clean Air Act rather than as a part of a comprehensive federal restructuring bill. Moreover, we do not support the imposition of any fuel mandate such as the renewable portfolio standard as proposed in S. 1047. However, if such a mandate is to be imposed, we urge you to include hydropower within the eligible mix.

#### **H.R. 2050, Electric Consumers' Power to Choose Act of 1999**

APPA applauds the bipartisan leadership of Representatives Largent and Markey, and expresses its sincere gratitude to them for the inclusion of the provisions of the Bond Fairness and Protection Act as part of their comprehensive legislation. The efforts of these two Members to advance comprehensive electric utility industry restructuring legislation have brought all electric consumers one step closer to realizing the benefits of a more competitive electric utility industry.

The Largent/Markey bill addresses a very broad range of issues, including: public power's "private use" problem; reliability and the need for mandatory reliability standards; market power and means to address it and the right of "any entity" to serve as an aggregator to meet the electric demands of one or more consumers, whether or not permitted under state law; provisions regarding the Tennessee Valley Authority and the federal power marketing administrations; prospective elimination of the mandatory purchase requirements of the Public Utility Regulatory Policies Act; prospective repeal of the Public Utility Holding Company Act within a limited time, while transferring certain consumer protection provisions of that Act to the Federal Energy Regulatory Commission and the Federal Trade Commission; modifications to the Federal Power Act regarding approval of mergers by FERC; modifications to the Federal Power Act regarding FERC jurisdiction over public power transmission facilities; expanded authority for FERC to order utilities to participate in regional transmission organizations; and clarification of FERC and state commission jurisdiction over electric utility transactions.

With respect to "private use," the Largent/Markey bill adopts the solution advanced in the 106th Congress by Representatives Hayworth and Matsui, H.R. 721. This solution is strongly endorsed by the American Public Power Association. There are really only two areas of concern with the provisions, albeit, very important areas for public power.

The Largent/Markey bill includes a “flexible mandate” under which all states and self-regulated utilities must decide whether or not to deregulate their operations. As stated previously, we do not believe such a mandate is appropriate, and, in view of Chairman Bliley’s recent comments on this issue, hope that this proposition is no longer in play.

The market power provisions of H.R. 2050 enhance to a limited extent FERC’s authority to deal with market power problems, but fail to address certain critical issues, including concentration of control of generation facilities in the hands of a few giant corporations, which is one of the most critical market power problems facing the industry today. A review of APPA’s specific positions on the provisions of H.R. 2050 follows:

#### **Provisions of H.R. 2050 Consistent with APPA Policy**

- The bill includes provisions of the Bond Fairness and Protection Act, S.386/H.R. 721 in order to address the private use problem for public power with tax exempt bonds in a competitive environment. The bill repeals PUHCA prospectively, and provides some level of market power and consumer protection in its place.
- The bill also gives FERC the authority to require all transmitting utilities (including public power) to participate in a regional transmission organization.
- The bill reforms PURPA by eliminating future purchase requirements, but in a comprehensive manner with the inclusion of incentives to support use of renewable resources.
- The bill includes provisions that deal with the TVA, BPA, and other PMAs that maintain preference; flexibility for related distribution systems and does not include a move to market-based rates.
- The bill retains state authority over stranded cost determinations and the creation of public purpose programs.
- The bill includes industry consensus language on the transition from the North American Electric Reliability Council (NERC) to the North American Electric Reliability Organization (NAERO) with the teeth needed to enforce the resulting NAERO reliability standards.
- The bill allows for consumers, or any entity acting on their behalf, to aggregate electricity purchases in order to benefit from the ability to secure a lower cost contract. (Please note the need to clarify that “any entity” includes municipalities, to ensure we do not encounter the interpretation problems we have seen with respect to the telecommunications competition law.)

#### **Areas of Concern**

- **The “Flexible Mandate”**—H.R. 2050 provides for a “flexible mandate” for retail choice of electric supplier by January 1, 2002 by allowing states, municipal utilities and cooperative systems to opt-out of competition, similar to the Administration’s competition proposal. The burden, however, is on the states and municipal systems to prove that competition will harm a particular class of customer that cannot be “reasonably mitigated”, and it creates a burdensome reporting relationship with FERC that encroaches on local control.
- **Insufficient Market Power Provisions**—while the bill includes some important consumer protections, overall the market power provisions are not strong enough to adequately protect all consumer interests.
- The bill expands FERC authority to address market power only as related to the use of transmission and distribution. The bill’s biggest shortcoming regarding market power is that it does not provide avenues for remedies to generation market power issues.
- FERC’s authority is reactive; it only goes into effect in cases where market power is occurring or has occurred. FERC does not have the authority to address cases where market power can occur.
- When FERC identifies that market power abuses are happening, it can force a company to develop a plan to “reduce or eliminate” market power. Failure to abide by a FERC-approved plan, or failure to gain FERC approval for a plan, would result in FERC requiring the company to charge cost-based rates plus a reasonable rate of return on investment for either wholesale or retail sales. This is a new expansion of FERC authority into retail rates that the states are sure to protest. FERC has the ability to elect not to take such action if it determines that it would not reduce market power. Further, it is not apparent that this is a sufficient remedy for abuses of market power.
- **Approach to Renewable Resources**—the bill attempts to foster growth in the renewables market without a mandate, but does include the provision for a renewable portfolio standard if enough renewable resources are not “chosen” by

consumers to constitute 3 percent of the energy produced by 2005. Furthermore, a significant portion of the renewable provisions involve “tax incentives” not available to public power. Lastly, hydropower is not defined as a “renewable” resource.

- **Transmission Jurisdiction**—the bill gives FERC full authority over all transmission facilities, including those owned by public power.

**H.R. 2363, Public Utility Holding Company Act of 1999**

With regard to H.R. 2363, let me reiterate a point that was made in my earlier testimony. While APPA understands that many stakeholders believe that PUHCA must be repealed, we are opposed to stand-alone PUHCA repeal. Changes in the Public Utility Holding Company Act (PUHCA) should only be undertaken in the context of broader changes in the Federal Power Act.

**H.R. 2569, The Fair Energy Competition Act of 1999**

Representative Pallone’s recently introduced legislation builds upon his proposal from the last session. The bill replaces many features of the current Clean Air Act with new provisions to control electric generator emissions of NO<sub>x</sub>, SO<sub>2</sub>, CO<sub>2</sub> and mercury. It also includes provisions to promote renewable and energy efficiency. APPA does not support dealing with Clean Air Act issues in a restructuring bill, but it is important to note, with appreciation to Representative Pallone, that the legislation does recognize some of the unique features of public power’s use of small generators and the fact that tax incentives are not helpful to all sectors of the industry. Furthermore, while the bill does not recognize hydropower as a renewable resource, which is important to APPA member utilities, it does contain other positive elements such as defining landfill methane recovery project as renewable under RPS, recognizes the value of existing small municipal generators for use as peaking units and important for reliability, and does not preempt state renewable activities.

*Conclusion*

Mr. Chairman, thank you for inviting me to testify before you today regarding public power’s restructuring objectives and views on pending industry restructuring proposals. APPA looks forward to working closely with you to enact legislation that can achieve our shared goal of bringing more affordable electricity to all consumers. A detailed set of legislative suggestions that APPA supports for inclusion in a federal bill is attached at the end of this testimony.

Mr. BARTON. I thank the gentleman. Congressman English, for your opening statement.

**STATEMENT OF GLENN ENGLISH**

Mr. ENGLISH. Thank you very much, Mr. Chairman. I appreciate that. I am Glenn English. I do represent the National Rural Electric Cooperative Association, which is made up of some 1,000 electric cooperatives in 46 States all across the country. Some 32 million consumers are served by electric cooperatives and own those cooperatives.

I might also point out, Mr. Chairman, that those of course are not for profit, private ownership by those consumers. Let me just say I appreciate the opportunity to testify here today and to talk about restructuring. As has been noted, some 23 States have already passed laws within their States or regulatory regimes, that are going to result in some kind of consumer choice for electricity consumers across this country. Virtually every other State in the country is reviewing similar legislation.

Certainly those members of the committee are well-acquainted with the fact that many of their constituents, who own those electric cooperatives, are also participating in that competition. In fact, two-thirds of our members are residential and small business consumers. We represent primarily rural America, and more sparsely rugged areas of the country and those that we serve. However, this cooperative model that is in existence, and has been used for some

60 years primarily by people in rural America, is now emerging as an effective business model for people in urban areas as well. As members of the committee I think are well-aware that we have a new electric cooperative in New York City, the First Rochdale Electric Cooperative, which is a purchasing power for people who are primarily living in housing cooperatives.

In California we have a similar type of new cooperative that was established in which a number of agra business have joined; some 18 agra businesses in fact; California growers and producers creating the California Electric Users Cooperative. These, we think, are extremely important to take note of, given the fact that they do provide all of those consumers in those areas a new option, an option that they have not had in the past.

Now, we think done right, that competition can result in some very dramatic technological innovation and lower electric bills for consumers. Also, if it is done wrong, Mr. Chairman, we think that it can very well raise prices, lower competition, and damage already vulnerable sections of our economy.

What we would suggest, Mr. Chairman is that, first, Congress must not allow the restructuring debate to result in a massive shift of regulatory to the Federal Government. This could dramatically increase rates to businesses and residential consumers, and of course diminish the opportunity for consumers to meet their own needs and to do it themselves, so to speak.

Second, we would suggest, Mr. Chairman, that electric cooperatives believe that Congress should craft Federal restructuring policy that recognizes the threshold of the question of how and when should be left up to the individual States. We are very pleased to see that this committee seems to be moving in that direction.

We also, Mr. Chairman, oppose any kind of opt-out provision, such as the Administration is suggesting simply because we think that simply requires States to jump through a series of regulatory hoops and second guessing the State legislatures themselves.

Third, Mr. Chairman, we think effective competition must enable cooperatives, as aggregation groups, to offer the same services as any other sellers of electricity. The repeal of the Public Utility Holding Company Act is a central feature of many other restructuring proposals that we have seen. Now, if this long-standing consumer protection law is to be repealed, consumers may be left with few choices.

Multi-national holding companies with deep pockets and no allegiance to local communities that they serve will suddenly expand into areas that were limited because of PUHCA. The result could be a risk to consumers. That can be mitigated assuming that consumers do have the choice of doing it for themselves.

Fourth, Mr. Chairman, I think effective competition depends upon the ability of consumers to have a real bargaining strength in the marketplace. While industrial consumers, by virtue of their very large size and the large pie requirements, will likely see lower prices because of competition. Residential and small business consumers will enjoy the benefit of competition, only if they are able to aggregate.

Fifth, Mr. Chairman, effective competition must ensure that all Americans have access to reliable, affordable, and safe electric

power. That means that they must continue to have access to the power marketing administrations.

I want to commend this committee for holding the hearings and the work that is done, Mr. Chairman. Thank you very much.

[The prepared statement of Glenn English follows:]

PREPARED STATEMENT OF GLENN ENGLISH, CHIEF EXECUTIVE OFFICER, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Mr. Chairman, members of the Committee. I am Glenn English, Chief Executive Officer of the National Rural Electric Cooperative Association (NRECA), the Washington-based association of the nation's nearly 1,000 not-for-profit, consumer-owned private electric systems. These systems provide electric service to more than 32 million consumers in 46 states.

I appreciate the opportunity to appear before the House Commerce Subcommittee on Energy and Power today to continue the dialogue on the restructuring of the electric utility industry. As the Committee knows, the electric utility industry is in a period of dramatic transformation. Twenty-three states have adopted laws or regulatory regimes that will eventually result in customer choice for electricity and related services. Virtually every other state is seriously reviewing whether retail choice is the right fit for their particular circumstance.

This Committee is well acquainted with their constituents who are the owners of America's electric cooperatives. Nationally, about two-thirds of our consumer/owners buy power for their homes and small businesses. We serve predominately rural America—the most sparsely populated, rugged, difficult to serve areas in the country. Yet, as states move to embrace retail competition, the cooperative model is emerging as an effective business model for consumers everywhere to achieve competition's promise of more affordably priced electricity.

In New York City, housing cooperatives have joined together and formed the 1st Rochdale Electric Cooperative to increase the buying power of residential consumers in a competitive marketplace. Similarly, in California 18 agriculture cooperatives representing California growers and producers have formed the California Electric Users Cooperative (CEUC). CEUC is the nation's first electric cooperative structured solely to service agriculture with an aggregated electric power purchase. These are but two examples of how important the cooperative choice is to real competition in the electric utility industry.

As a general proposition, electric cooperatives and their 32 million consumers welcome the benefits that competition in the electric utility industry can potentially bring to all classes of electricity consumers. Done right, competition can result in dramatic technological innovation and lower electric bills for American families. But, Congress must act carefully. Done wrong, restructuring can raise prices, lower competition and damage already vulnerable rural economies. Electric cooperatives believe the following basic priorities should guide federal restructuring efforts:

- Congress should not use this debate to bring about a massive shift of regulatory authority to the Federal Government.
- The decision to open retail electricity markets to competition properly rests with the individual states.
- Effective competition will allow consumers to have a cooperative choice for their electric and energy service provider.
- Congress should not use this debate to set environmental policy or subsidize otherwise non-profitable types of generation.
- The benefits provided to rural citizens by Power Marketing Administration (PMA) power and the RUS loan programs must not be jeopardized.

*Federal Restructuring Legislation*

Electric cooperatives will support electric utility industry restructuring legislation only if the specific proposal promotes real competition for American families, farms and small businesses. It is against this determinant that we evaluate the several legislative proposals introduced this Congress and pending before this Committee.

First, Congress must not allow the debate on restructuring to result in a massive shift of regulatory authority to the Federal Government. The creation of an expansive new federal bureaucracy over rural electric cooperatives could dramatically increase the electricity rates for businesses and residential consumers and diminish the opportunity for consumers to meet their own needs without providing any tangible benefits.

For example, the Clinton Administration's legislation on electric industry restructuring (H.R. 1828) requires substantial new taxes on all electric generation, creates

a myriad of new programs at the Department of Energy, and confers broad new powers on the Federal Energy Regulatory Commission (FERC). Included in these new powers is the expansion of FERC jurisdiction over transmission-owning rural electric cooperatives, including possibly more than 400 distribution cooperatives. Some of these cooperatives own less than ten miles of line that serve a distribution purpose but could be defined as “transmission” by FERC. Cooperatives could be further burdened by duplicative and potentially contrary regulation between existing United States Department of Agriculture Rural Utility Service regulation and expanded FERC jurisdiction. Why submit these utilities to FERC jurisdiction without any corresponding benefit or value to the consumers of these coops?

Electric cooperatives strongly oppose this expansion of federal regulation. Such regulation is tremendously expensive and unnecessary to the promotion of open retail electric markets or system reliability. Cooperatives are already active proponents of national reliability standards, and the development of effective voluntary regional transmission organizations (RTOs). These measures, not more regulation, will be the most effective federal tools in managing the nation’s transmission system for robust competition and reliability.

Second, electric cooperatives believe that Congress should craft a federal restructuring policy that recognizes that the threshold question of if, when, and how to move to retail competition should be left to the states.

Congress should not require states to implement retail competition by a date certain. Such a date-certain mandate undercuts the rights of states to craft customized solutions to meet their unique challenges.

For example, both Texas and Ohio recently concluded fierce debates over whether to enact retail competition legislation. That they had the freedom to wage this debate without the specter of a federal mandate hanging over their heads is a prerogative all states should enjoy. States should not be forced to act prematurely in order to beat a federal deadline.

Similarly, a special Kentucky legislative task force researching utility restructuring has just received a study that concludes that competitive electricity prices will be higher than the current regulated rates. The Kentucky legislature should be given time and flexibility to protect Kentucky citizens from the risks inherent in competition, without the external pressure of a federal mandate.

NRECA also opposes an “opt out” provision, such as that in the Administration’s restructuring proposal (H.R. 1828). The Administration would require a state regulatory agency to jump through onerous regulatory proceedings solely to justify the state’s decision to maintain the status quo. Such an opt-out provision serves as an effective mandate by imposing additional costs on states that seek to opt out.

The Administration’s opt-out provision also denigrates the sovereignty of state legislatures. If a state legislature chooses not to implement competition for some customers, why should the state public utility commission be required to second guess the legislature by conducting a proceeding and making statutorily required findings?

Third, effective competition must enable cooperatives to offer the same services as other sellers of electricity. The decision whether to repeal the Public Utility Holding Company Act (PUHCA) is a central feature of the federal restructuring debate. If this longstanding consumer protection law is repealed, consumers may be left with fewer choices. Multi-national holding companies with deep pockets and no allegiance to the local communities they serve will suddenly expand into areas previously limited by PUHCA. This resulting risk to consumers can be mitigated, however, by ensuring that consumers have the choice of doing it for themselves.

In fact, the arguments used by supporters of PUHCA repeal strongly supports language removing restrictions on the activities in which consumer-owned electric cooperatives can engage. The imposition of artificial limitations on the lines of business in which companies can engage and on the corporate form they can adopt raises prices for consumers and harms competition by eliminating significant efficiencies and reducing the number of competitors in the restricted businesses. That is as true of the restrictions state enabling acts place on cooperatives as it is of the restrictions PUHCA places on registered holding companies.

Yet, unlike the enabling acts, PUHCA plays an important consumer protection role, preventing registered holding companies from amassing undue market power and engaging in consumer abuses.

As the industry is restructured there will remain a critical need for an effective statute to check potential abuses of market power in the electric utility industry. Thus, if PUHCA is repealed, Congress must ensure that consumers are protected against market dominance and market power abuses. Representative Burr’s proposal (H.R. 667) provides an effective consumer protection—a federal guarantee that consumers have a cooperative choice in the post PUHCA marketplace.



Fourth, effective competition also depends upon the ability of consumers to have real bargaining strength in the marketplace. While industrial customers, by virtue of their large power requirements, will likely see lower prices under competition, electricity sellers are less likely to actively compete for the individual homeowner.

Residential and small business customers will enjoy the benefits of retail competition in the electric industry only if they are able to aggregate as one collective buying group. For this reason, NRECA strongly supports language that guarantees the right of all consumers to either join or form an electric cooperative for the purpose of buying energy and energy related services.

Fifth, effective competition must ensure that all Americans—including consumers owning electric cooperatives—have access to reliable, affordable and safe electric service. To ensure this, electric cooperatives must continue to have access to the loan programs of the RUS and to the federal Power Marketing Administration (PMA) hydroelectric power programs.

While retail competition is likely to mean lower rates for large commercial and industrial customers throughout the U.S., and may lower rates for families in high-cost states, residential customers in many states will see limited benefits, and may see higher rates, under retail competition. A number of studies, including those completed by the American Gas Association (*The Impact of industry Restructuring on Electricity Prices, July 1998*), the U.S. Department of Agriculture (*Electric Utility Deregulation: Rural Effects, Briefing to Senior USDA Policy Officials, January 1999*), and the Energy Information Agency (*Electricity Prices in a Competitive Environment: Marginal Cost Pricing of Generation Services and Financial Status of Electric Utilities, DOE/EIA-0614, August 1997*) have recently made this very finding. A strong RUS loan program and continued access to the power of the PMAs are essential to ensuring that rural consumers who are otherwise at risk will enjoy affordably priced and dependable electricity.

#### *Environmental Issues.*

Electric cooperatives operate between six and seven percent of the nation's generating facilities, and 80 percent of those facilities are coal-fired. Electric cooperatives also operate 20 percent of the Nation's most environmentally advanced, state-of-the-art coal generation facilities.

New and emerging technologies and techniques provide promising alternatives to command and control environmental mitigation conventions. Electric cooperatives have been in the forefront of efforts to discover and implement technologies that address the Nation's environmental concerns economically and efficiently. For example, electric cooperatives were among the first, a decade ago, to utilize fluidized bed technology to reduce sulfur dioxide emissions.

Restructuring of the electric utility industry, however, should not become a vehicle for making environmental policy. We are particularly concerned about policies that would virtually tax coal-fired generation out of business. While suggestions that define the sources for America's growing electric energy requirements make for fine sound bites, they do not adequately address the Nation's long-term requirement for electricity. Electric cooperatives believe that sustainable research, technological innovation and incentive programs will lead the way to realistic planning for the Nation's energy future.

#### *The Power Marketing Administration Reform Act (H.R. 1486)*

NRECA strongly opposes the Power Marketing Administration Reform Act (H.R. 1486). More than 600 rural electric systems in 34 states purchase all or part of their power supply from the PMAs. The rural electric systems have relatively few consumers per mile of transmission and distribution line. These systems, and the fragile rural economies they serve, depend on the continued availability of the federal resources at stable rate levels. The PMAs, while providing power at cost, return millions of dollars each year to the federal Treasury. Consumer-owned private electric systems have faithfully honored their side of the partnership by repaying, on schedule, all costs assigned to them by Congress. For instance, the original investments in the Hoover Dam, Bonneville Dam and Grand Coulee Dam have been completely paid off at Congressionally established interest rates.

H.R. 1486 is nothing more than a discriminatory, backdoor tax on rural Americans. The bid and auction system envisioned by this legislation will pit small non-profit rural electric cooperatives against deep-pocketed IOUs and power marketers for access to federal power. H.R. 1486 is possibly one of the most anti-consumer proposals this Congress will consider. The Congressional Research Service accurately identified the negative impacts of market rates in its 1995 report on the PMAs:

"Since the 1930's (sic), it has been the policy of the federal government to market Federal power at cost, encouraging its use. As a result, an entire infrastruc-

ture has developed which has significant regional economic implications... For those whose economy and way of life are tied to this system, this market pricing alternative must be considered among the worst of the alternatives discussed in this report... *it may also maximize the pain to the consumers affected by the change.*"

The General Accounting Office has concluded that under a market rate scenario, many consumers could see large increases in their power bills. According to the GAO, consumers in my home state of Oklahoma would pay about \$22 more in their average monthly electricity bills. Consumers in the rural Midwest would suffer a similar fate. In the Pacific Northwest, a move to market rates would have a devastating impact on a regional economy that was built upon cost-based federal power. In the Southeast and Southwest, rural electric consumers would most assuredly lose access to valuable cost based peaking power under H.R. 1486. Accordingly, NRECA urges the Committee to reject this anti-consumer legislation.

*Conclusion.*

In closing, let me express the appreciation of electric cooperatives for the Committee's willingness to examine in some depth the issues involved in electric utility restructuring. The electric utility industry is the largest, most complex industry for which Congress has contemplated deregulation. The immensity of the industry, not to mention the effect on every consumer in these United States, warrants careful and thorough dialogue with all concerned—especially consumers—before concepts are set into law.

The general principles that I have articulated today provide the essential framework for protecting consumers in a restructured marketplace. These principles provide the measure by which electric cooperatives support or oppose any legislative proposal pending before this Committee.

Mr. BARTON. Thank you. Mr. Cavanagh, your opening statement for 5 minutes.

**STATEMENT OF RALPH CAVANAGH**

Mr. CAVANAGH. Mr. Chairman, on behalf of the Natural Resources Defense Council, I have worked for 20 years with utilities across America; public power, cooperatives, David Owens' membership. I do not show up here very often to ask Congress to do something. My forums are State and local forums.

There are a few times when there are major interstate problems that only Congress can solve, and we think this is one of them. I would submit, Mr. Chairman, that all of the issues you have heard about today really fall into four big categories: reliability, competition, environmental quality, equity.

Now, those are the big interstate issues. We are all talking about them. The competition and reliability, issues well-covered by my colleagues on this panel, I think Congress is moving toward a consensus. It is a consensus that is illustrated by the Largent-Markey bill and by the administration's bill.

On those issues, we are clearly moving for the common position. We need to apply that same constructive energy, Mr. Chairman, to the environment and equity issues, as you did Congressman Pallone with your bill last Tuesday. You reminded us in that bill that electric generation creates, by weight, more than  $\frac{1}{3}$  of the four major interstate air pollutants that carry Federal emissions reporting requirements, more than  $\frac{1}{3}$  of all of the air pollution, even though this industry accounts for less than 3 percent of our Gross Domestic Product, if you just think about the electric bill.

If you think this is a big pocketbook issue, as it surely is as Congressman Largent reminded us. It is an even bigger environmental issue. As to the equity dimension, which I know Fred Schmidt will

also speak to, the recent heat emergencies have reminded us that access to electricity can be quite literally a matter of life and death.

The provision of services to low income households is a continuing responsibility of this industry, however it is restructured. Now, what we learned at the State and local level is that a promising way to tackle both the environment and equity challenges is to dedicate a small generally uniformed fraction of every electric bill to support investments in energy efficiency, low income services renewable energy. All of your States have done that.

For more than 20 years, these environment and equity investments have been a small part and a very productive part of electric bills across America, in different packages to be sure, with designs tailored to local conditions. My testimony lists some of the success stories.

We have cut the electricity needs of the average refrigerator, Congressman, by  $\frac{2}{3}$  over the last 20 years, even as the machines have gotten bigger and delivered better service. We did that in large part through utility investment.

We brought biomass, geothermal, wind and solar, the emerging renewables close to competitive parity. Those four kinds of renewable resource apply to every one of your States. They are pleased to make a significant move into the market.

So, why does Congress need to do anything in this field about environment and equity? Why not just open the grid to competition and leave these issues to the States? Two big problems the States cannot solve by themselves.

The first is inconsistent pollution regulation. We have heard the older plants, the incumbents, to looser standards for new entrants. I have heard repeatedly today that we have got to apply the same rules to our competitors. We do not do it, Congressman, with pollution regulation. Congressman Pallone, your bill shows the way to do it. You described it. We like it.

The second major problem that the States cannot solve by themselves is that an altogether unintended consequence of industry restructuring has been drastic cutbacks in those utility sector investments in efficiency, renewable, low income services. Now Congressmen, historically in all of your States those investments were at 2.5 to 5 percent of the electric bill; small fraction, hugely productive fraction.

In the last several years, we have seen cutbacks averaging about 50 percent across the country, simply in response to uncertainty about future industry structure and regulation. Now, we are not calling on you to take over those functions from the States. We are calling on you to provide financial incentives to restore those reduced incentives.

The Pallone and the administration's bills use two integrated and wholly compatible market-based approaches. Both are cost captive; 1 to 2 percent of the National electric bill.

The first is the renewable portfolio standard for emerging renewables to ensure that they complete the transition toward commercial maturity.

The second, conceived by a State Regulator from Vermont, Rich Cowart, is a matching fund for environment and equity invest-

ments, which is included in both the administration and Pallone bills.

Now, do these represent new taxes, or new Federal programs, or new Federal bureaucracies? Congressmen these proposals simply keep in electric rates; environment and equity investments that are already in electric rates that have been there for two decades that are related directly to electric service.

These cost capped initiatives are intended to relieve pressure for new taxes and new Federal programs. Their system reliability benefits, Mr. Chairman, will help ensure that we do not have to spend more summers reading editorials called "Lessons From the Black-out."

Thank you.

[The prepared statement of Ralph Cavanagh follows:]

PREPARED STATEMENT OF RALPH CAVANAGH, ENERGY PROGRAM CO-DIRECTOR,  
NATURAL RESOURCES DEFENSE COUNCIL

This testimony presents the views of the Natural Resources Defense Council (NRDC), a nonprofit organization dedicated to environmental protection with more than 400,000 members nationwide. I have served since 1979 as Co-Director of NRDC's Energy Program, and have worked with electric utilities, regulators, and others throughout the nation on solutions to environmental challenges associated with electricity generation. My additional roles during that period include Visiting Professor of Law at Stanford and the University of California and a member of Task Forces appointed by the Secretary of Energy to address North American reliability concerns and long-term priorities for research and development.

SUMMARY OF TESTIMONY

The Chairman's invitation to present this testimony included references to eight pending bills, all of which—including a proposal by the Administration—address America's vital and rapidly changing electricity system. My focus here is the environmental challenges that this Subcommittee confronts as it seeks to integrate these and related initiatives. I include specific strategies for addressing the concerns that NRDC and many colleagues bring to this process.

Often I am asked to predict whether environmental quality will suffer under electric-industry restructuring (sometimes misnamed "deregulation"). My answer is that matters could get significantly better *or* worse, depending on decisions by publicly accountable bodies that have not yet been made. Failures to decide generally make things worse, by unleashing a corrosive uncertainty that threatens grid reliability and strangles long-term investment in environmentally superior technologies. Short-term trends suggest that inconsistent environmental regulation is delivering wholly inappropriate competitive advantages to the oldest and dirtiest incumbent generators. Congress is now the forum whose prolonged inaction on restructuring would be most dangerous.

I reach this conclusion without disputing that state and local authorities are going to continue making most decisions about the structure of the U.S. electric industry. Skepticism inevitably confronts efforts to involve the Congress, yet it manages to intervene periodically on matters broadly understood to raise compelling interstate and national interests. Successful legislation requires bipartisan cooperation, substantial consensus across the utility industry and its principal constituents, and executive-branch leadership.

I will not predict precisely when all those ingredients will next come together, but that it will happen I have no doubt whatever. And among the best reasons will be to stop inferior environmental performance from yielding market rewards and pollution damages. Both cross state lines with impunity.

Some in the evolving debate over Congressional action ask why a restructuring bill must take on potentially contentious environmental concerns. Isn't tackling the rules of competition and reliability hard enough without having to worry about environment at the same time? But in literally no other industry do these issues intertwine so thoroughly, and no other industry has so much to gain by persuading Congress to launch a comprehensive and integrated response. As such legislation meanders inexorably toward the President's desk, the economic case for strong environmental provisions will help ensure that the entire package survives and succeeds.

## I. ELECTRICITY'S PARAMOUNT ENVIRONMENTAL SIGNIFICANCE

Electricity production is the most important single factor in the nation's principal interstate environmental dilemmas. Our collective electricity bill is less than 3% of the gross national product, but for major air pollutants the relative contribution is more than tenfold greater.<sup>1</sup> The environmental challenges that implicate electrical generation include "urban and regional smog (ozone), fine particles, acid deposition, excessive nutrient loads to important water bodies..., toxic impacts on health and ecosystems from mercury emissions, nitrogen saturation of sensitive forest ecosystems, regional haze and climate change."<sup>2</sup> Even that daunting list is incomplete, given—for example—electricity's dominance in debates over disposal of radioactive waste, survival of endangered salmon fisheries, and the preservation of undammed rivers. And its importance on all these counts has grown with a surging market share. The United States saw electricity generation almost double between 1973 and 1998, while petroleum use barely increased and natural gas consumption actually declined.<sup>3</sup>

Given the electric sector's fuel mix, this meant that coal dominated inter-fuel competition over that period, with coal consumption up more than 80%. By 1998, electric generation accounted for 90% of U.S. coal use (up from 69% a quarter century earlier), and while for all other purposes coal consumption is down about 40% since 1973, power plants burned 134% more last year than they did then.<sup>4</sup>

Entire volumes have been compiled on the many water, air and land pollutants associated with the nation's diverse array of electric generation technologies.<sup>5</sup> Prominent among these, and associated most prominently with coal combustion, are sulfur dioxide, nitrogen oxides, mercury and carbon dioxide. In total tonnage released to the atmosphere, more than one-third of these emissions originate in power plants; for sulfur dioxide, that figure doubles.<sup>6</sup> For the power sector, coal-fired units account for virtually all the sulfur and mercury emissions and 90% of the carbon dioxide.<sup>7</sup>

Sulfur and nitrogen emissions, reverberating over hundreds and even thousands of kilometers, inflict varied and sometimes linked damages to ecosystems and public health. For example, both figure prominently in the acid deposition that "has been implicated in... the decline and loss of fish populations in thousands of lakes and streams in Eastern North America" and in "harm[ing] forests by causing leaf damage, limiting the availability of nutrients in the soil, and releasing toxic substances such as heavy metals (e.g., aluminum) in the soil."<sup>8</sup> Evidence also abounds of public health losses associated with minute airborne particles, many traceable directly to fuel combustion in power plants, with estimates of the annual U.S. death toll alone as high as 60,000 annually.<sup>9</sup> Moreover, nitrogen oxides exacerbate urban ozone problems, inflicting on residents "symptoms such as cough, shortness of breath,

<sup>1</sup> For a useful review of the downward trend in U.S. electricity costs since the early 1980s, see K. Smith, *Electricity Pricing Trends Challenge Conventional Wisdom on Retail Wheeling*, *Electricity Journal* (April 1996), p. 84.

<sup>2</sup> Letter to Congressman Edward J. Markey from Mary D. Nichols, Assistant Administrator for Air and Radiation, March 28, 1997, p. 1.

<sup>3</sup> U.S. Energy Information Administration, *Monthly Energy Review* (March 1999). Petroleum consumption increased by 5% over that period, while natural gas was down by 3%. Electricity generation totals are approximate, since EIA data for nonutility generation do not extend back to 1973.

<sup>4</sup> See *id.*, Table 6.2.

<sup>5</sup> One of the most comprehensive attempts was commissioned by the New York State Energy Research and Development Authority. Pace University Center for Environmental Legal Studies, *Environmental Costs of Electricity* (1990).

<sup>6</sup> For an assessment of cross-border impacts and relative contributions by power generation, see Commission for Environmental Cooperation, *Continental Pollutant Pathways: An Agenda for Cooperation to Address Long-Range Transport of Air Pollution in North America* (September 1997). For example, electric utilities' contribution to total sulfur dioxide emissions is 22%, 48% and 70% for Canada, Mexico and the United States, respectively; for nitrogen oxides the figures are 10%, 15% and 33%. *Id.*, p. 21. The U.S. figure for mercury is approximately 33%, which means that "coal-fired electricity generating boilers are the single largest source of anthropogenic mercury emissions." Environmental Energy Insights, Vol. II, Issue 4, p. 3 (M.J. Bradley & Associates: April 1994). For discussion of cross-border consequences of mercury emissions, see *id.*, pp. 4-8. U.S. CO<sub>2</sub> emissions account for about 36% of the national total. U.S. Environmental Protection Agency, *Inventory of US Greenhouse Gas Emissions and Sinks: 1990-1997* (March 1999).

<sup>7</sup> Clean Air Task Force, *The U.S. Coal Fleet: A Current Snapshot* (April 20, 1999).

<sup>8</sup> CEC, note 6 above, at p. 10.

<sup>9</sup> *Id.*, at p. 14 (citing estimates by Harvard University researchers). See generally R. Wilson & J. Spengler, *Particles in Our Air: Concentrations and Health Effects* (Harvard School of Public Health, 1996).

pain..., throat dryness, wheezing, chest tightness, and inhibition or interference with the immune system.”<sup>10</sup>

Airborne mercury emissions and subsequent accumulation in animal fats are additional unwelcome byproducts of coal combustion. “A significant proportion of these emissions circulate far beyond their sources, resulting in elevated levels throughout North America, particularly in the northeastern United States, eastern Canada and the Arctic.”<sup>11</sup> Results include liver and kidney damage, infertility, and fetal malformations, along with multiple forms of damage to aquatic ecosystems. “This problem is so prevalent that five Canadian provinces and over 35 U.S. states have issued health advisories to reduce the consumption of certain freshwater fish that are known to contain excessive levels of mercury.”<sup>12</sup>

Finally, carbon dioxide emissions from electric generation challenge the U.S. treaty commitment to help stabilize concentrations of greenhouse gases in the atmosphere. Emissions are increasing despite the President’s pledge to stabilize greenhouse gas releases at 1990 levels by the year 2000. Worldwide, atmospheric concentrations of carbon dioxide are up by one-third from pre-industrial levels, and potential consequences over the next century include rising sea levels and widespread disruptions of both natural ecosystems and agriculture.<sup>13</sup>

Of course, the electricity sector also has been a prolific source of environmental solutions. The industry’s output of sulfur dioxide and nitrogen oxides has dropped over the past two decades, at control costs far below initial projections. High-efficiency natural gas and renewable energy applications offer attractive replacements for aging fossil and nuclear fleets. End-use efficiency improvements, many pioneered with electric-utility investment, provide abundant opportunities to deliver more and better service with less electricity and pollution.<sup>14</sup>

The environmental consequences of electric-industry restructuring depend vitally on the sources of incremental generation and the extent to which energy efficiency improvements can substitute for additional power production. Will a giant, unequally regulated fleet of coal-fired power plant expand market share at the expense of sources with lower emissions? Will restructuring inhibit or help countervailing efforts to promote energy efficiency and renewable energy? Through choices that are reviewed below, the states and Congress will resolve together whether meeting our expanding needs for electricity service will yield a net environmental benefit or cost.

## II. A SHORT HISTORY OF ELECTRIC-INDUSTRY RESTRUCTURING

Americans traditionally have secured their electrical service from integrated monopolies with tightly defined geographical franchises. The monopolies were responsible for meeting all local power needs, by building generation dedicated to and compulsorily paid for by all customers within their service territories. The transmission grid that evolved around and through the local monopolies was shaped to fit their peculiar domestic needs. Interchanges between systems were modest, both physically and economically. In this world of self-sufficient monopolies, intersystem (let alone international) trade had at best a marginal role.

But this cloistered system began to change decisively as early as the 1960s with the construction of the Pacific Intertie,<sup>15</sup> and it is fast disappearing today. North America’s entire electricity sector faces fundamental restructuring as the twentieth century closes. A host of causes include technological change, local economic pressures and independent initiatives by industry and regulatory leaders in Canada and Mexico as well as the United States, with numerous States and Provinces now striking out on their own.

Alberta took the lead in 1993 by deciding to establish the continent’s most fully competitive wholesale spot market for electric generation, even as British Columbia was moving to invigorate its own short-term markets.<sup>16</sup> California followed in April

<sup>10</sup> CEC, note 6 above, at p. 12.

<sup>11</sup> *Id.*, at p. 10.

<sup>12</sup> *Id.*, at p. 11.

<sup>13</sup> See, e.g., House of Commons, Canada, Standing Committee on Environment, *Out of Balance: The Risks of Irreversible Climate Change* (March 1991).

<sup>14</sup> See, e.g., U.S. Department of Energy, Report to the President and Congress of the United States on the Current Status and Likely Impacts of Integrated Resource Planning (March 1995).

<sup>15</sup> The Pacific Intertie effectively links British Columbia and Alberta with at least eleven Western states and parts of Mexico; simultaneous transfer capacity for the AC and DC elements of the system is close to 8,000 MW.

<sup>16</sup> The California Public Utilities Commission cited the B.C. reforms as precedent for its own much more wide-ranging restructuring proposal. See Order Instituting Rulemaking and Order Instituting Investigation on the Commission’s Proposed Policies Governing Restructuring Cali-

Continued

of 1994 with an ambitious proposal, later embodied in legislation, to phase out its retail electric monopolies and offer all customers direct access to competitive generation markets.<sup>17</sup> Still more consequential was an April 1996 ruling by the Federal Energy Regulatory Commission, which forced all private owners of transmission to offer competitors access to their grids on the same terms afforded the owners' own generating units.<sup>18</sup>

By mid-1999, 21 states with more than half of the population had formally signaled an end to their integrated utility monopolies, and Congress was considering numerous proposals for industrywide restructuring.<sup>19</sup> Several of the federal bills envisioned a prompt deadline for giving all U.S. customers what Californians obtained on March 31, 1998: the opportunity to choose their electricity supplier over a transmission system that was operated with complete independence from every generation owner. All these initiatives in part reflect a clamor among industrial- and commercial-sector electricity customers for reduced and more uniform electricity prices. They see their utilities shopping for the lowest priced power across a continental grid, and they seek comparable opportunities for themselves.

Electric-industry restructuring also had roots in much earlier domestic initiatives, like the Public Utility Regulatory Policies Act of 1978 and the National Energy Policy Act of 1992. These statutes helped launch a diverse, intensely competitive electric-generation sector that was increasingly independent of the traditional utility monopolies.

At the heart of the restructuring enterprise is a vision of a competitive generation sector fighting for markets across a continental transmission grid.<sup>20</sup> No incumbent generator can be sheltered by any monopolist from competitive challenge, and new entrants are guaranteed access to the grid on terms identical to those that incumbents enjoy. Although not yet fully realized anywhere in North America, this "open grid" ideal is at the heart of reform initiatives in all three countries and draws support from the spirit and letter of the North American Free Trade Agreement (NAFTA).<sup>21</sup> Certainly no NAFTA signatory can open its grid to domestic competitors without according the same opportunity to neighbors.<sup>22</sup> Already electricity transactions routinely cross state and national borders and link generators to buyers thousands of miles away.

The open grid movement draws continuing impetus from the collapse of historic generation monopolies. Competitive procurement is now the rule for generation additions in Canada and Mexico as well as the United States. Largely vanished is the availability of integrated utility monopolies as regulated investors in new generating assets, with repayment guaranteed by levies on captive customers. New generation equipment must make its way in an increasingly unforgiving marketplace. Units built under the old monopoly regimes are changing hands, as pressures build to separate competitive generation assets from the regulated monopolies that continue to control transmission and distribution systems. The goal of the open grid is to make electricity demand throughout North America contestable by every existing and prospective generator, with little or no regard for national and provincial boundaries. Transmission constraints obviously create limits on this prospect, but a combination of technological innovation, entrepreneurial ingenuity and market incentives should steadily expand those limits.

As markets open and consumption increases, public policy choices loom that could have profound environmental consequences. The most immediate involve a huge U.S. coal generation fleet that could expand production significantly within the constraints of today's electrical grid; increasingly aggressive natural-gas generation competitors eager to win new customers; an incipient renewable energy sector of un-

formia's Electric Services Industry and Reforming Regulation, R. 94-04-031 (April 1994), at p. 19 n. 16.

<sup>17</sup> See *id.*

<sup>18</sup> See 61 Federal Register 21540 (1996).

<sup>19</sup> The states were Arkansas, Arizona, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Texas and Virginia. Other states, including Ohio and Oregon, were poised to act. For an internet site summarizing state-by-state progress, see <http://www.eia.doe.gov/cneaf/electricity/chg-str/tab5rev.html>

<sup>20</sup> For an influential variation on this theme by the Chair of the Economics Department at the Massachusetts Institute of Technology, see P. Joskow, *How Will It All End? The Electric Utility Industry in 2005*, *Electricity Journal* (January/February 1996), at 67.

<sup>21</sup> See, e.g., U.S. Federal Energy Regulatory Commission, Order No. 888, 18 C.F.R. Parts 35 and 36 (April 24, 1996); Order Denying Motion for Stay, 79 FERC 61,367 (June 20, 1997) (addressing open access issues in the context of NAFTA requirements, in proceeding brought by Ontario Hydro).

<sup>22</sup> See *id.* for an early case study involving Ontario Hydro and the U.S. grid.

certain scope and promise; and a host of inexpensive but untapped opportunities to improve the efficiency of energy use.

It is too soon to know how those elements will combine. What follows are scenarios for the evolution of trade over a continental power grid, which yield a spectrum of environmental outcomes. None is preordained; all hinge in substantial part on choices that have yet to be made.

### III. ALTERNATIVE RESTRUCTURING SCENARIOS AND THEIR ENVIRONMENTAL IMPLICATIONS

None of the scenarios below represent a prediction of the environmental consequences of electric-industry evolution. The exercise facing policymakers and industry is not fundamentally predictive but creative. Electrical energy futures are the product of human and institutional initiative, not immutable natural forces.

I begin with a worst-case scenario under which economic growth and electricity trade yield significant net environmental degradation. Industry restructuring has increased competitive pressures on producers of all goods and services throughout North America. This could mean fuel switching to cheaper and dirtier generation, and a deferral of investment in new technologies. But a critical variable is how environmental considerations will figure in new statutory and regulatory regimes for electricity.

#### *A. Inconsistent Emissions Standards and Regulatory Uncertainties Could Lead to Increased Pollution*

For at least the next decade, North America's single most important environmental variable is the fate of more than 300,000 Megawatts of coal-fired generation in the United States. This equipment now produces more than half of U.S. generation, and dwarfs the combined installed capacity of all kinds in Canada and Mexico (about 150,000 MW).<sup>23</sup> Most of the units "are allowed to pollute at emission levels 4 to 100 times those that must be met by their new competitors."<sup>24</sup> If the competitive advantage associated with these looser standards proved decisive, U.S. coal-fired generation could raise production by as much as one third over levels prevailing in the mid-1990s, in response to continental demand growth and access to new markets.<sup>25</sup> The units at which these increases would occur already lead the power generation sector—and indeed the entire economy—in their emissions of sulfur dioxide, nitrogen oxides, carbon dioxide and mercury.<sup>26</sup>

Early returns are inconclusive but hardly encouraging. From 1995-1997, coal combustion for electric generation was a big winner, increasing by 8 percent, while natural gas use for the same purpose declined by more than 5 percent.<sup>27</sup> Among the apparent environmental losers have been New England and New York, which are seeing significant short-term increases in power-plant pollution.<sup>28</sup>

At the same time, industry restructuring could work to stall recent progress in bringing new nonpolluting technologies to the electricity marketplace. An immediate potential victim is improvements in end-use efficiency, which faced formidable market barriers even before the restructuring process gained momentum. These widely

<sup>23</sup> Commission for Environmental Cooperation, *Assessing Environmental Effects of the North American Free Trade Agreement* (1999), p. 364.

<sup>24</sup> A. Cohen, *Unfinished Business: Cleaning Up the Nation's Power Plant Fleet*, Clean Power J., Summer 1997, at 1 [<http://www.cleanpower.org>]. Cohen goes on to explain that "[t]his anomaly stems from the 'old source' exemption granted to existing fossil fuel plants in the original Clean Air Act, in 1970 and again in 1977, on the theory that these older plants would be retired within 20-30 years."

<sup>25</sup> This is among the findings of the Environmental Impact Statement prepared in conjunction with FERC Order 888. Federal Energy Regulatory Commission, Final Environmental Impact Statement: Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities (RM95-8-000) (April 1996). FERC's view, however, is that coal will fail to achieve this level of penetration as a result of aggressive competition from gas-fired units.

<sup>26</sup> Sulfur emissions from U.S. generation are capped by the 1990 Clean Air Act, of course, but the statute does not address emissions from expanded generation in Canada and Mexico.

<sup>27</sup> Monthly Energy Review, note 3 above, Table 7.6 [data from both utility and non-utility sources were available only through 1997]. Oil did even better in percentage terms, taking advantage of favorable commodity prices to boost its production of electricity by 18%, but oil started from a modest base of about 2% of total generation.

<sup>28</sup> See *Air Pollution Jumps at NE Power Plants*, Boston Globe, April 6, 1999, p. A1 (reporting increases in sulfur dioxide and nitrogen dioxide oxides releases, respectively, of 41% and 24% between 1996 and 1998 for New England as a whole); A. Revkin, Report Finds Power Plants Dirtier in '98, New York Times, April 21, 1999, p. B5 (New York's in-state power plant emissions of sulfur dioxide and nitrogen oxides increased 21 percent and 12 percent, respectively, in 1998). Much more encouraging, from a long-term perspective, is a surge in Northeastern applications to build high-efficiency natural gas generation.



documented market failures generate “systematic underinvestment in energy efficiency,” creating opportunities for “substantial cost-effective energy savings in buildings and equipment, generally in the range of 20-40%.”<sup>29</sup>

The nation measures these lost opportunities in foregone wealth as well as environmental degradation. Two examples will suffice here. We spend \$26 billion annually to light commercial buildings, yet 80 percent of the lighting stock is inefficient and obsolete; it wastes at least half the electricity it consumes, compared with readily available upgrades that would pay for themselves in three years or less.<sup>30</sup> Less than five percent of large new nonresidential buildings—and less than one-tenth of one percent of the existing stock—take advantage of basic “commissioning” services to ensure that the major energy-using systems perform as designed; the resulting energy waste from simple neglect is on the order of 10%, or about \$5 billion per year.<sup>31</sup>

Electricity distribution companies potentially have much to contribute as catalysts of energy-efficiency progress, but progress has slowed in recent years. “Whereas in 1992, utility spending on energy efficiency programs was expected to increase by 50% from 1994 to 1997, actual spending took a ‘u-turn’ and went down by over 30 percent from 1994 to 1996, with declines now projected to continue for the rest of the decade.”<sup>32</sup> Major elements of the utility industry have halted investment altogether; a survey of 1997 data concluded acidly that “the City of Eugene, Oregon, whose utility serves some 73,000 customers, invested more in energy efficiency than the combined outlay of Southern Company, Entergy, Commonwealth Edison, and American Electric Power, which serve more than 12 million customers.”<sup>33</sup>

These trends threaten a fifteen year success story, in which hundreds of utilities built a whole new renewable energy industry and also proved that they could invest productively in a host of end-use energy efficiency improvements. That record of achievement cuts across the spectrum of utility size and ownership structure. It yielded mass-produced energy savings less costly than equivalent unburned fuel at power plants, even as “annual savings equivalent to one percent of system consumption were being achieved by companies that had in no sense tested the limits of their capacity.”<sup>34</sup>

As industry restructuring proceeds, however, it creates fierce pressures to accelerate recovery of investments in potentially uneconomic generation without increasing rates. The surest and least controversial means to this end seems to be sustained increases in commodity sales. Dependence on such increases, of course, undermines commitments to efficiency improvements and pollution reductions. The maturation of small-scale load-center generation is creating analogous dilemmas for throughput-addicted distribution systems, since customers who installed such resources would be cutting directly into their utilities’ retail margins.

In short, a plausible worst-case scenario is a surge of production from aging coal-fired plants that overwhelms more tightly regulated competitors, coupled with a rapid decline of utility-sector investment in energy efficiency and renewable generating technologies. While certainly conceivable, there is nothing inevitable about this prospect. But it looms today unless Congress unleashes countervailing forces, which are the subject of the next two sections. These options should be seen as complementary rather than competitive; in Carl Weinberg’s phrase, the electricity sector’s best hope now is not a silver bullet, but silver buckshot.

#### *B. Open Grids Could Improve Environmental Quality by Accelerating Capital Turnover*

One straightforward change in the assumptions governing the previous scenario yields dramatic results: eliminate the competitive advantage older coal-fired plants hold over new market entrants by virtue of inconsistent U.S. pollution standards.

<sup>29</sup> See M. Levine, J. Koomey, J. McMahon, A. Sanstad & E. Hirst, *Energy Efficiency Policy and Market Failures*, 20 Annual Review of Energy and the Environment 535, 536 & 547 (1995); Alliance to Save Energy et al., *Energy Innovations: A Prosperous Path to a Clean Environment* (June 1997).

<sup>30</sup> C. Calwell, D. Dowers & D. Johnson, *How Far Have We Come?: Remaining Opportunities for Upgrading Fluorescent Ballasts and Lamps* (E Source Strategic Memo, May 1998), pp. 1-2.

<sup>31</sup> PEI, *National Strategy for Building Commissioning* (U.S. Department of Energy, September 1998), p. 6.

<sup>32</sup> M. Kushler, *An Updated Status Report of Public Benefit Programs in an Evolving Electric Utility Industry* (American Council for an Energy Efficient Economy, September 1998), p. 3.

<sup>33</sup> J. Coifman, *Utility Deregulation a Bust for Energy Efficiency Programs* (Environmental Media Services Press Release, October 1, 1998). On the other hand, Commonwealth Edison’s subsequent appointment of CEO John Rowe virtually ensured an energy-efficiency renaissance there at least.

<sup>34</sup> R. Cavanagh, *Restructuring for Sustainability: Toward New Electric Services Industries*, *Electricity Journal* (July 1996), at p. 72.

“Requiring all fossil plants to meet the same emissions standards met routinely by post-1977 power plants would decrease [U.S.] power sector sulfur dioxide and nitrogen oxides by 75-80 percent from otherwise projected levels in the year 2000.”<sup>35</sup> Decisions about how to achieve such reductions would benefit also from greater certainty about future limits on emissions of mercury and carbon dioxide; Congress’s continuing failure to provide it creates escalating risks that capital will be wasted on partial one-pollutant fixes that miss opportunities to reduce other emissions. Wherever one stands in the spectrum of generation competitors in terms of relative environmental performance today, there is a shared stake in a more predictable, integrated and coherent regulatory future.

If Congress acts to remove regulatory pollution subsidies for existing units, the open grid emerges as a powerful force for upgrading one of North America’s oldest industrial infrastructures. Three-fifths of U.S. coal-fired capacity is at least thirty years old; about 40% has celebrated a fortieth birthday.<sup>36</sup> Open grids should eliminate the capacity of monopoly owners to shield their aging progeny from newer, cleaner competitors.

Critical here, however, are assurances that incumbent generators are indeed functioning independently of the monopoly systems that historically have protected them from market pressures. As industry restructuring begins, many transmission and distribution monopolies continue to own generation. Those companies have obvious incentives to favor that part of the competitive generation market comprised of their own power plant investments. Mechanisms will be needed to overcome that conflict of interest. Otherwise, residual monopolies could temporarily frustrate open markets that industry restructuring promotes.<sup>37</sup>

A related problem is the political temptation to protect influential incumbents by including, as an element of electric-industry restructuring, government subsidies for selected power plants. California effectively closed important markets to competitors from every western jurisdiction, foreign and domestic, when it guaranteed above-market payments to more than 4500 Megawatts of nuclear generation.<sup>38</sup> In the same category are Washington State’s tax breaks for Centralia’s 1300 Megawatts of aging coal-fired capacity.<sup>39</sup> Fortunately, as these examples themselves reveal on inspection, the politics of subsidy for selected competitors are increasingly tenuous; California’s nuclear-generation payments will end between 2001 and 2003, and Centralia’s survival even that long is in doubt.<sup>40</sup>

#### *C. End-Use Efficiencies and Renewable Energy Could Benefit from Integrated Incentives and Regulatory Policies*

At least four specific strategies have emerged in Congress for promoting energy efficiency and renewable energy under electric-industry restructuring. All attack the market barriers to long-term investment in efficiency and renewable energy technology. Proposals are now pending for a uniform volume-based charge on transmission use, which would be used to match dollar-for-dollar qualifying state-level investments in energy efficiency, renewable energy, and other public purposes.<sup>41</sup> Counting both the proposed charges and the potential matching funds, these initiatives could raise as much as \$12 billion annually to open new U.S. markets for energy efficiency and renewable energy.

A second strategy focuses specifically on renewable energy and assigns a minimum content requirement to all electricity producers. They could meet this obligation either by acquiring qualifying renewable capacity or buying credits from those with surplus renewable production. Bills incorporating such requirements are designed to spur up to a ten-fold increase in renewable energy’s nationwide contribution.<sup>42</sup>

<sup>35</sup> A. Cohen, note 24 above.

<sup>36</sup> Clean Air Task Force, *Coal Plant Distribution by Date* (Boston, MA: April 1999).

<sup>37</sup> As a result, much regulatory attention currently centers on mechanisms for separating grid operation from generation ownership. In addition, as noted earlier, some integrated monopolies are selling off their generation.

<sup>38</sup> See California Public Utilities Commission, Decision 96-01-011 and 96-04-059, affirmed by the California legislature in AB 1890, section 367 (1996).

<sup>39</sup> Substitute House Bill 1257 (1997) (establishing tax exemption for pollution control facilities, and forcing repayment of part or all of exempted tax if Centralia is retired prior to 2023).

<sup>40</sup> See, e.g., Editorial, *Centralia Coal a Clunker*, The Oregonian (April 20, 1999); A. Gibbs, *Bidders Asked to Convert Centralia Steam Plant from Coal to Gas*, Tacoma News-Tribune (March 22, 1999) (describing regionwide campaign to force an end to coal combustion at site).

<sup>41</sup> See, e.g., H.R. 1357 (DeFazio) (1997).

<sup>42</sup> See H.R. 655 (Schaefer), H.R. 1960 (Markey), S. 237 (Bumpers) and S. 687 (Jeffords), all introduced during the 1997-1998 legislative session. These bills set the initial minimum-content

Continued

Third, the United States has at least two decades of experience with direct government regulation of equipment and building efficiency, based on mandatory minimum standards. The potential for environmental and economic benefit is illustrated in a recent assessment by two national laboratories;<sup>43</sup> they investigated the impact of legislation enacted in 1987, which phased in minimum efficiency standards for seven equipment categories:

Cumulative government expenditures to develop standards: \$50 million

Cumulative net benefit for appliances sold from 1990-2015: \$46 billion

Avoided electrical generation over twenty years: 20,000+ MW

Reductions in total national emissions of SO<sub>2</sub>, NO<sub>2</sub> & CO<sub>2</sub>: 1.5-2%

Despite these and other widely acclaimed precedents, federal and state regulators have not come close to exhausting the potential cost-effective contribution of tighter appliance and building standards. And opportunities to coordinate such initiatives across national boundaries barely have been touched. Also needed is better synchronization of incentive-based and regulatory approaches; to help minimize costs and controversy associated with tighter minimum efficiency standards, utilities have shown how to use targeted financial incentives for the appliance and building industries and training programs for code enforcers.<sup>44</sup>

Finally, both Congress and the Administration have shown substantial interest in giving customers better and more uniform information about the environmental characteristics of electricity products, as a necessary if not sufficient condition to opening new markets for cleaner power sources. The evolution of "nutrition-label" equivalents for electricity products is not a substitute for the regulatory and incentive policies discussed above; here as elsewhere, the nation would be ill-advised to rely solely on individual volunteers to meet important interstate environmental objectives. But opportunities to vote with electric bills for environmentally superior generation and energy efficiency certainly can complement other means to those ends.

#### CONCLUSION

A former U.S. Secretary of Energy liked to observe that if electricity is just another commodity, then oxygen is just another gas. Competitive markets for generation cannot work efficiently if regulatory subsidies for incumbents are suppressing new entrants, if power-plant emissions are defeating environmental and public-health objectives, or if technological progress stalls. And individual states are in no position to solve these manifestly interstate dilemmas, even assuming the best efforts of local regulatory and legislative bodies. Pending a comprehensive Congressional response, piecemeal and inconsistent industry-restructuring and environmental initiatives will ensure escalating pressures for remedial action, as frustration grows among economic and environmental constituencies alike. Before too much longer the combination should prove irresistible.

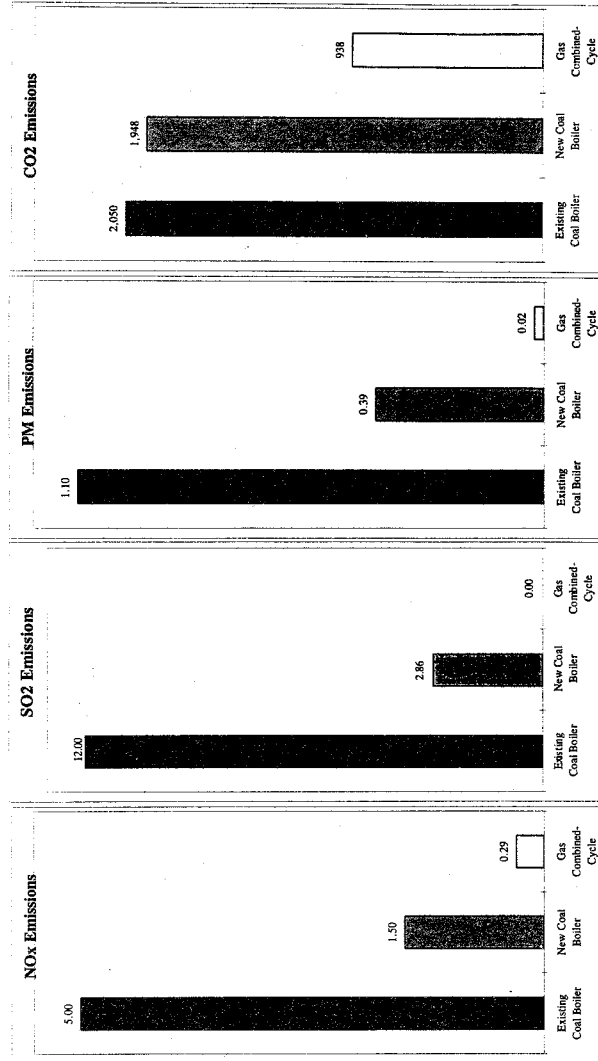
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requirement at the current average contribution of renewable sources other than hydropower—about two percent—and phase in increases, reaching (for H.R. 1960 and S. 687) ten percent by 2010. The mandate reached 20% by 2020 in S. 687. In addressing the possible international application of such U.S. requirements, the Commission on Environmental Cooperation recently concluded that "portfolio requirements may will survive a challenge under NAFTA if applied in an equal and nondiscriminatory way to all electricity production, regardless of origin." CEC, note 23 above, at p. 269.

<sup>43</sup> M. Levine et al., note 29 above, pp. 543-47. The equipment categories are residential furnaces, room air conditioners, central air conditioners, electric heating, water heating, refrigerators and freezers. The net benefit estimate is based upon a real discount rate of 6% and reflects "a net present cost of \$32 billion for higher-priced appliances and a net present savings of \$78 billion."

<sup>44</sup> A recent illustration is the April 1997 increase in the U.S. minimum efficiency standard for refrigerators, which drew in part on technological advances associated with a multi-utility investment program that successfully integrated higher operating efficiencies with a phaseout of chlorofluorocarbons.

**Air Emissions from 300 MW Powerplants:  
Existing Coal Boiler, New Coal Boiler and New Gas-Fired Combined-Cycle  
(lb/MWh)**

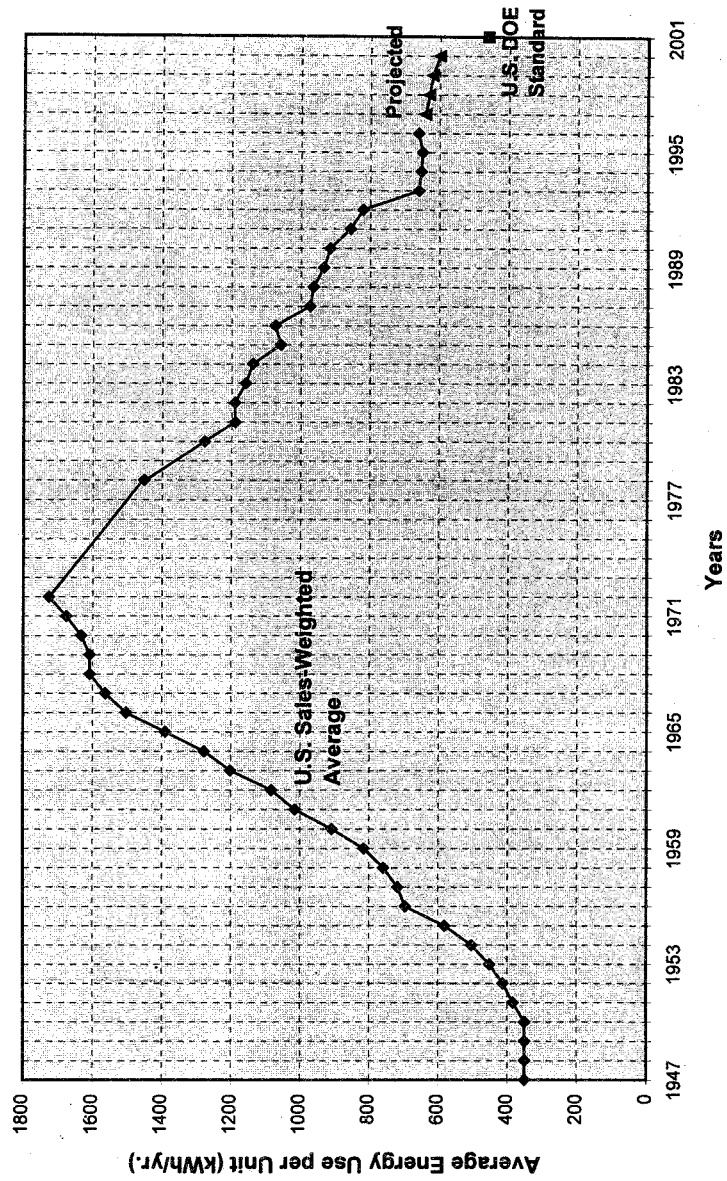


Key assumptions for the table include the following:

Existing coal: 0.5 lb NOx/MMBtu, 1.2 lb SO2/MMBtu (low sulfur coal), heat rate=10,000 Btu/kWh  
 New Coal: 0.159 lb NOx/MMBtu, 0.3 lb SO2/MMBtu (scrubber), heat rate=9,504 Btu/kWh  
 Combined cycle: 9 ppm NOx, heat rate = 7,300 Btu/kWh

Coalition for Gas-Based Environmental Solutions

### ***U.S. Refrigerator Energy Use vs. Time***



Mr. BARTON. I thank the gentleman. Mr. Schmidt, you are recognized for 5 minutes for your opening statement.

#### STATEMENT OF FRED SCHMIDT

Mr. SCHMIDT. Thank you. Although my address is listed on your handout as Washington, DC, this is actually one of the very few times that I come to Washington, DC. My formal title is I am the State Consumer Advocate in the State of Nevada where I oversee anti-trust regulation, consumer protection laws, and utility advocacy.

I am out in the trenches, in the States doing what your Federal legislation is going to affect. In my own State, we passed comprehensive electric restructuring legislation 2 years ago. We modified it and we clarified it this year. I will tell you it is not impossible to do a bipartisan bill. We had Republicans and Democrats almost unanimously vote for both bills that went through my legislature.

We are looking forward to opening our market in March of the year 2000. On the other hand, there are certain things that we recognized as we went through all of those debates that only Federal legislation can do and not State legislation; ways in which States interact with each other because transmission crosses our borders.

I am here today on behalf of the National Association I represent as President this year of the utility consumer advocates. People, like me, who by State law in 39 of our States only have one voice and one constituency. We speak for your representatives who are consumers of electricity. Our job is to get it right for them to make sure that they are not negatively impacted.

So, what I am here to do today is not talk in detail about your bills. I have 10 pages of testimony that I urge you to look at. I am here to give you a guideline to measure what you do against what your constituents, who are electricity consumers, want. The checklist that I have attached to my testimony in the back of the testimony is also blown up in the chart on my left here.

[Chart]

There are 12 points to that checklist. Those are things that myself and my colleagues in 39 other States have agreed are appropriate areas for Federal legislation not to deal with or needs to deal with. If your legislation meets those 12 checklist points, then we support it. I will tell you the Largent-Markey bill comes closest now to comprehensively dealing with those 12 points.

A number of other bills deal with individual points. We only support those points that they deal comprehensively with the points that are listed on the checklist. The first point that is listed on the checklist, I would note that I want to offer my praise as well as the other speakers, for the chairman's recent statements which suggest, as we have been urging, that you do not need to mandate legislation on the Federal level or a date-certain for States. Nearly two dozen States have gone. My State is gone. We are all doing it. There is a lot of value to those State experiments.

The second point on the checklist for stranded cost is another area that you do not need to deal with. States have stranded cost issues that are unique to each State. Nearly every State that has gone forward on competition of the 22 has addressed and dealt

with that issue. We do not need a Federal standard to deal with it.

The third point, market power, that is an issue area where you do need to deal with something. If you do not have structural separation in this industry, I assure you, just like it took more than a decade for telecommunications to get into competition and get going to where we are today, it is going to take that long or longer for us to have meaningful retail electrical competition.

All utilities do not necessarily agree with Mr. Owens' statement on this. The utilities in my State have announced plans to divest every single power plant in the State within the next 1½ years. All of the States that have competition are moving in that direction. The State utilities that are experiencing competition are making a choice.

They are either getting into the generation business, which is going to be very, very competitive in the near future, more so than it has in the past, or they are getting in to the business of deciding they want to be a wires utility where we will need regulation and we will need to continue to have oversight because those will continue to be monopolies.

In that regard, my fourth checklist point, transmission and ISOs. This is a critical point. ISOs are not forming, even though we have voluntarily sought to have them formed through the FERC's guidance and through encouragement from State Regulators and from industry representatives. We have had a lot of talk, but no action.

The only ISOs that are in place and working with our tight power pools are in the Northeast, the mid-Atlantic States which has PJM, and California which went through the expensive cost of creating it from scratch. We are not going to have competition in the rest of the country until we have those type of buffers between the competitive market on the generation side and the regulated market, which will remain for some time on the wires side of the distribution utilities.

We need an independent buffer and we need the ability of Federal legislation to mandate that, that occurs. I will skip reliability standards because you had a hearing on that 2 months ago. We supported the NERC bill. We now have two consumer advocate members on that committee.

I will also skip through the other ones since my time is up. I will tell you that consumer protection is the key area. Consumer protection, if you did not learn anything from the telecommunications experience, is something you need to deal with here. It took 15 years for us to figure out that cramming and slamming was going to become a major problem. Then you had to deal comprehensively on an individual basis.

We ought to deal with something like that up front. With three times the amount of money involved in the electric industry as the telephone industry, I can assure you as a State Attorney General's representative, slamming and cramming, which is now the No. 3 issue area in complaints in our State and across the Nation, will be just as big a problem for electricity.

So, deal with it up front. Do not wait for it to become a problem. Thank you very much.

[The prepared statement of Fred Schmidt follows:]

PREPARED STATEMENT OF FRED SCHMIDT, PRESIDENT, NATIONAL ASSOCIATION OF  
STATE CONSUMER ADVOCATES

My name is Fred Schmidt. I am the Consumer Advocate for the state of Nevada and a Chief Deputy Attorney General. In my state, I oversee the Attorney General's consumer fraud, antitrust and utility consumer advocate units. I also serve as President of the National Association of State Consumer Advocates (NASUCA), on whose behalf I am testifying today.

NASUCA is an organization of 42 state utility consumer advocate offices from 39 states and the District of Columbia, charged by their respective state statutes with representing utility consumers before state and federal utility commissions and before state and federal courts. For the most part, consumer advocates represent residential and small commercial consumers. As a result, NASUCA members are intricately involved in electric utility restructuring debates in their respective states, and—through NASUCA—in Washington as well. NASUCA greatly appreciates the opportunity to testify at this legislative hearing.

#### I. INTRODUCTION

First, I would like to commend Chairman Barton, the members of the Committee, and your staffs for your consistent recognition throughout your careful deliberations that it is the impact of your actions on consumers of electricity that is of paramount importance. NASUCA truly appreciates your continuing efforts seek out the views of consumers and consumer representatives. We look forward to continuing to work with you in developing policies and legislation that benefit all consumers and complement what many states have already chosen to do.

As this Committee proceeds with consideration of restructuring legislation, NASUCA is confident that you will keep the interests of consumers foremost in your mind. Electricity is an essential component of modern life. The actions taken by this Committee—and ultimately the Congress—will have a profound effect not only on electric consumers, but on the future of the nation as a whole. Therefore, NASUCA urges Congress to adopt those policies and principles that are fair and benefit all electric consumers. The truth is that we will have accomplished very little if the end result of our labors is to bring competitive benefits to only a small segment of the electricity market, while rendering basic service less affordable and less reliable for all other Americans.

The restructuring legislative proposals before this Committee offer different visions of the future of the electric industry. NASUCA, as a truly state-based organization, also embraces many, diverse visions of the future electric industry. Nevertheless, the members of NASUCA have been able to develop a Consumer Checklist of provisions that must be included in any legislation in order to insure that consumers get a fair deal, not a raw deal. I will spend the next few minutes discussing the Consumer Checklist and how it relates to the legislation before this Committee.

In summary, NASUCA will support legislation that will facilitate the transition to competition in those portions of the electric industry where competition is likely to do a better job than regulation in protecting consumers. However, NASUCA shares the belief of many members of this subcommittee that Congress should not mandate retail competition in every state by a date certain, and should not preempt the ability of states to determine whether and to what extent utilities should recover costs that are stranded as a result of retail competition. On the other hand, NASUCA members believe that there are a number of critical issues in this debate that only Congress can handle. These issues include market power and reliability.

#### II. CONSUMER CHECKLIST

As I just mentioned, NASUCA has developed a Consumer Checklist, a common sense roster of principles that must be included in any federal legislation to insure that electric restructuring benefits, rather than harms consumers. I would like to take the next few minutes to review the checklist and apply the principles to the legislation at hand.

**1. Federal Preemption:** *Federal legislation should permit states to adopt retail competition statutes or rules. There should not be a federal mandate for states to require retail competition by a date certain.*

Without a legislative mandate from Congress, states are already considering and adopting alternatives to traditional regulation of electric utilities. For example, my state of Nevada has already adopted restructuring legislation. In NASUCA's view, it is the state legislatures and regulators that are in the best position to tailor restructuring to meet the needs of consumers within their states. I would like to applaud the Chair of the full committee for his recent comments that a date certain



mandate is not necessary. We encourage the subcommittee to follow through with legislative language that adopts those sentiments.

**2. Stranded Costs:** *Retail stranded cost issues should be left to the states.*

State legislators and regulators are best suited to determine the appropriate sharing of costs and benefits which result from the transition from regulation to competition. H.R. 1828 contains federal “backup” authority related to stranded costs. This provision concerns us if it results in a federally-mandated stranded cost rule and allows forum shopping for stranded costs. H.R. 2050 specifically leaves it up to the states to determine the recovery of “transitions costs.” This provision is obviously consistent with NASUCA policy.

**3. Market Power:** *Legislation should provide the FERC with specific authority to monitor the development of competitive markets, to eliminate undue concentrations of market power in any relevant market, and to remedy anticompetitive conduct or the abuse of market power by any player—incumbents, affiliates, or new market entrants. These powers should include the authority to order divestiture or other structural remedies when necessary.*

Language in H.R. 1828 and H.R. 2050 are the absolute floors in regard to market power. Unless FERC has the authority to order the structural and behavioral remedies necessary, there will be little fear of sanctions for misbehavior and abuse by incumbent monopolies, and little hope of competition ever developing. This would leave us with deregulated monopolies, the worst of all possible worlds.

**4. Transmission/ISOs:** *Legislation should authorize FERC to require ISOs or other independent and competitively-neutral regional transmission operation organizations. Legislation should authorize FERC to rectify transmission policies, practices or prices which create a competitive advantage for services offered by the transmission provider or affiliates.*

Simply stated, open, fair and nondiscriminatory transmission access is the key to developing a competitive electricity market. To encourage open access, H.R.1828 and H.R. 2050 include provisions on new institutional arrangements known generally as “Independent System Operators.” H.R.1828 permits FERC to “approve interstate compacts that establish regional transmission planning agencies,” while H.R. 2050 authorizes FERC to create entities for the independent ownership or control of transmission and authorizes FERC to compel utilities to relinquish control of transmission facilities to such independent entities. NASUCA supports language similar to that in H.R. 1828 that would clarify FERC’s authority to approve ISOs and mandate minimum standards.

**5. Reliability:** *Legislation should authorize FERC to review the reliability requirements imposed by an independent North American Reliability Organization to promote reliability of electricity supply.*

The reliability of the nation’s electric system is of paramount importance to the consumers represented by the members of NASUCA. First and foremost, under any scheme the lights must continue to come on. NASUCA supports the efforts taken to date by NERC to expand representation within that organization, but recognizes that additional changes will be necessary to preserve reliability in an increasingly competitive environment. Reliability provisions must be included in any legislation you consider. H.R. 1828 contains a praiseworthy reliability section which NASUCA will support with one modification. It must be made clear that states have a vital role in maintaining the reliability, safety and adequacy of electric systems within each state’s borders. As long as states do not act in a manner that interferes with NERC’s or FERC’s requirements in interstate commerce, the states must not be preempted from taking action to insure that the lights stay on.

**6. Consumer Protection:** *Legislation by Congress should adopt provisions which would set minimum standards for basic consumer protection. States should retain authority to set additional or more stringent or more specific standards. Legislative consumer protection standards should:*

- *Provide all consumers access to reliable, safe and affordable electric services.*
- *Require protections from unreasonable deposit and credit requirements and service denials.*
- *Require the provision of default energy supply service at a fair, reasonable and affordable price.*
- *Protect consumers from unfair, deceptive, fraudulent or anti-competitive practices such as slamming, cramming and pyramid schemes.*
- *Develop accreditation or other appropriate financial requirements for marketers.*
- *Ensure that all consumers are given clear, unbiased and accurate information concerning price and terms of service.*
- *Require the disclosure of resource mix and environmental characteristics of generation.*
- *Establish the right of consumers to privacy.*

- *Establish or maintain access to an independent complaint process.*
- *Protect consumers from price increases resulting from inequitable cost shifting.*
- *Establish service quality standards.*

The only legislation before this Committee that addresses consumer protection issues in a comprehensive manner is H.R. 1828. These provisions, however, need to be expanded and strengthened to insure that consumers have at least minimal protection from abuses of unscrupulous marketers in the new competitive environment.

**7. Universal Service:** *Legislation should adopt universal service standards and principles as part of any restructuring. If there is a public benefits fund, a significant share of funding should be directed to provide matching grants to states to fund assistance to low-income customers and to ensure that adequate electric service is available to all customers.*

Market forces alone will not insure that all Americans have access to safe, affordable electric service. Of all the legislation before this Committee, only S.1828 includes a comprehensive universal service provision, including a matching fund provision. While NASUCA supports the matching fund concept, we have not taken a position on the issue of the public benefits language as a whole.

**8. Aggregation:** *Aggregation of small customers should be encouraged. Federal legislation should not preclude states from facilitating the aggregation of small customers by any entity.*

Aggregation is needed to insure that small customers benefit from restructuring. H.R.1828 and H.R. 2050 include provisions which facilitate aggregation subject to legitimate and nondiscriminatory state requirements. NASUCA supports this language.

**9. Renewable Energy:** *Legislation should remove any barriers to state implementation of net energy metering. If a renewable portfolio standard is established to promote renewable energy, it should apply only to new renewable resources.*

NASUCA supports the development and increased use of renewable resources for electric production, and has promoted regulatory strategies to encourage their development at the state level. Net metering is one of those strategies, and currently over 20 states require utilities to make net metering available. Concerning a federal renewable portfolio standard, NASUCA believes that it should be targeted to promote development of new resources, rather than provide a windfall for existing projects. None of the proposals before that committee are consistent with this policy.

**10. Mergers:** *Legislation should specifically revise merger standards to require a net benefit to consumers. Legislation should expand FERC merger authority to include combinations that are currently outside of FERC jurisdiction, such as electric-communications and electric-gas mergers.*

Today, FERC interprets court precedent to only require a “do no harm” result from mergers. However, state statutes and Section 201 of the Federal Power Act require action to minimize costs and to promote the public interest. Mergers are undertaken by utilities in emerging markets for strategic purposes. If these mergers are to truly promote the public interest, they must provide a net benefit to consumers. Unfortunately, language establishing a net benefit standard is lacking in all of the bills under consideration today. In addition, so-called “convergence mergers” can have a significant impact on incumbent market power, cross-industry consolidation, and can create potential cross-subsidies. Language expanding FERC merger authority to cover such “convergence mergers” is not present in H.R. 1828 or H.R. 2050.

**11. PUHCA:** *PUHCA should be addressed only as part of comprehensive restructuring legislation. Waiver of certain PUHCA provisions should be conditioned on holding companies (i) being subject to effective competition in every state in which they operate, or (ii) divesting all of their generation assets. In addition, legislation should provide FERC with current PUHCA authority to review affiliate transactions, provide state and federal access to books and records, and limit diversification.*

Only H.R. 2050 incorporates this key concept of competition first, then deregulation. If PUHCA provisions are not included, holding companies would have an ability to take advantage of a transition situation to gain tremendous market and financial advantage at the expense of captive utility ratepayers. The Largent-Markey legislation also provides the FERC with authority to review affiliate transactions, provides state and federal access to books and records, and retains limitations on diversification. This language is absolutely necessary to ferret out potential cross-subsidies between regulated and competitive endeavors of holding companies.

**12. PURPA:** *Legislation should not waive Section 210, the PURPA mandatory purchase obligation, unless protections are in place to insure that utility generation is subject to effective competition.*

NASUCA has long supported the development of cogeneration and small power production under the Public Utility Regulatory Policies Act of 1978. PURPA has

given rise to the development of a substantial number of non-utility generation projects that might not have been built or even considered were it not for this provision of federal law. If Section 210 of PURPA is repealed prior to the development of effective competition, electric utilities could return to their pre-PURPA role of monopoly seller and monopoly buyer of power within their service territories. All of the legislative proposals before this Committee provide for repeal of Section 210 of PURPA without first insuring that a competitive market exists.

### III. CONCLUSION

Crafting a new regulatory model that mixes competition in generation with continued regulation of transmission and distribution services is a formidable challenge that requires cooperation and coordination between federal and state governments. States have and will continue to move forward to develop retail competition plans that best meet the needs of their residents. However, it is clear that ultimately states can't do everything alone. The states need the federal government to step in to remove barriers to the development of competition, and to resolve issues which cross state borders.

NASUCA encourages this subcommittee and Congress to move forward on the issues included in the Consumer Checklist I have just outlined. Failure to do so guarantees failure and harms the consumer. After all, why go through all of this if the consumer is not going to reap the benefits of our labors?

Again, I thank you for this opportunity to testify today on behalf of NASUCA, and I look forward to your questions.

Mr. BARTON. I thank all of the witnesses. Mr. Schmidt, let me just ask you, I am looking at your chart. I was talking with staff. Where you mention market power; allowing FERC to remedy abuses of market power. Does that mean divestiture?

Mr. SCHMIDT. I think they need to have the authority to order structural separation. That can include divestiture, yes.

Mr. BARTON. So, that is what you favor. When you have consumer protection, of course, establishing minimum Federal standards for consumer protection, are you talking about the President's bill, labeling and other things?

Mr. SCHMIDT. I think that labeling is very critical to consumers. In survey work that has been done across the country, consumers want to know what they are paying for. They want to know, in fact, rather than mandate specific environmental things, if you have a requirement that you disclose what the source of electricity is, consumers, as has been shown in Pennsylvania and in California, will make choices on that basis, and they want to.

Mr. BARTON. Mr. Kean, did Order 888 eliminate the ability of IOU transmission owners to use their control of transmission to discriminate against their competitors? Do we need to take further steps to assure wholesale competition?

Mr. KEAN. Definitely we need to take further steps. Order 888 did not eliminate the problem. What Order 888 dealt with was really just about 10 to 15 percent of the use of the transmission system today. Wholesale transactions are really not done by the utility itself. It will have negative load in this market as markets open up to competition. We have negative load today.

Mr. English has negative load. Mr. Richardson's members have negative load. Our access to transmission needs to have the same priority, the same terms and conditions, the same processes as utilities have access to today, and we do not have that, and will not have it, even if Order 888 is applied to public transmission systems as well.

Mr. BARTON. This is a question for Mr. Owens and Mr. Richardson. What can be done to eliminate transmission constraints? What

will be the consequences if no action is taken to eliminate transmission constraints? Mr. Owens.

Mr. OWENS. I think a number of things can be done. I appreciate your asking that question. Our transmission system today is used significantly more than what it was intended to be used for. We have a significant number of new participants in the marketplace. There are several things that need to be done.

First, we need to provide incentives for the construction of new transmissions. If you will look at what is happening with open competition since the Energy Policy Act has been developed, you have over 4,000 new independent power producers, 650 power marketers, 2,000 municipal systems, 900 cooperative systems, and 200 investor-owned utilities.

There is not enough space on those transmission systems. So, we have to provide new incentive for the construction of transmission. We also have to look at how the transmission system is currently used and make sure that we have the right pricing incentives so that we can encourage efficient transactions to occur.

Finally, we need to make sure that all participants in the marketplace are subject to the same set of transmission rules. What Order 888 could not do was put all of the entities under FERC's jurisdiction. I think we need to do that as well.

Mr. BARTON. Mr. Richardson.

Mr. RICHARDSON. It seems to me, Mr. Chairman, that a part of the problem is that there are economic incentives not to remove constraints because of the way the transmission system is currently owned and operated. One of the primary issues that needs to be addressed to deal with this problem is to grant FERC the authority to order utilities to participate in independent system operator organizations in order to remove the economic incentives that the transmission owners have to continue with those constraints. With respect to incentives for construction, again, I think there are incentives not to construct because of the way that the system is currently operated. So, that utilities that own the transmission can favor their own generation by continuing the constraints in transmission.

Perhaps the most effective thing that could be done, but probably the most difficult issue to tackle, would be for this Congress to allow utilities to extend the authority of Federal eminent domain to construct transmission facilities because that is where the real problems are in getting these transmission lines constructed.

Mr. BARTON. Anyone else on the panel that perhaps disagrees and wants to comment? Yes, Mr. Cavanagh.

Mr. CAVANAGH. Mr. Chairman, a quick reminder that a part of the solution to congestion lies in using electricity more efficiently. It ought to be a matter of concern, if as I have suggested, we cut our National investment utility level by about 50 percent in energy efficiency, that might just be a part of the reason why we are seeing these increasing problems of congestion and restoring the incentive. To ramp those investments back up is surely a part of the solution.

Mr. BARTON. Mr. Owen, let me come back to you. I think in your opening statement you mentioned and you criticized the subsidies to government utilities and cooperatives. Do you think the Rural

Loan Program should be changed, reformed, reduced? What is your comment on that?

Mr. OWENS. Congressman, my criticism was not on the RUS Program. My comments were directed more specifically to how the electric system should evolve. In that area, for example, I would advocate that if new generation were to be constructed, that it needs to be constructed under the same set of rules.

I would not advocate that tax exempt financing should be available to any entity. If we are seeking to participate in the open competitive market, then they have to play by market rules, rather than having tax exempt financing in a range of broad subsidies to compete in that market.

That comment would relate to generation and transmission cooperatives who are seeking to expand competition through RUS funding. Those comments would equally apply to municipal systems that are seeking to participate in the open competitive market, through tax exempt finance.

Those comments would apply to the power marketing administrations, which I understand are very difficult entities to look at; the Bonneville Power Administration, the Tennessee Valley Authority, who are seeking to participate in open competitive markets. My point is that if they are seeking to build new power supply, then they need to be subject to the same set of rules.

Mr. BARTON. Thank you for that clarification. My time is expired. The gentleman from New Jersey, Mr. Pallone, is recognized for his questions.

Mr. PALLONE. Thank you. I wanted to ask Mr. Cavanagh a couple of questions. With regard to PURPA, I guess initially whether you believe that PURPA should be repealed and why? I guess I am assuming it is going to be repealed at some point. The question is what can we do to promote the commercial viability of renewables?

Mr. CAVANAGH. Well, exactly, Congressman Pallone. I hope if you are going to repeal it, what are we going to replace it with? The good news is we have learned over the 20 years since PURPA a whole lot about how to create incentives to cut the cost of new renewable capacity.

Your bill and the administration's bill also includes what we think is an extremely promising replacement for PURPA, which is the renewable portfolio standard that basically will put intense competitive pressure on the renewables industry to basically deliver those kilowatt hours at the lowest possible cost.

We will be replacing the old guaranteed purchase contracts with a market-based solution, but we have got to replace it with something. We are poised on the edge after 20 years of, again, a 2 percent share of solar, geothermal, wind, biomass ready to move. You will be hearing more about that from other witnesses. We do not want to just abandon it as we are on the verge of reaching our objective. We commend you for coming up with what we think is a good replacement for PURPA, but do not just get rid of it. Let us make sure that we sustain and build on the momentum that it created over the last 20 years.

Mr. PALLONE. Thank you. Let me ask you, in terms of the renewable portfolio standards, the whole issue of renewables, what per-

centage do you think we really need to move renewables into the marketplace?

Mr. CAVANAGH. We are now at 2 percent. We know we are within 1 to 1.5 cents a kilowatt hour, really, of competition. We have got bills now pending on the renewable portfolio standard in the range of 7.5 to 10 percent is the objective to expand that sector over the next decade. I think that is a reasonable place to start.

The point is we have also cost capped these bills. They have been referred to as open-ended, blank check mandates. They are anything but. We recognize and support cost caps on this provision. We are not trying to say renewables at any price. We are saying renewables are poised to be competitive. Give them a chance to prove it.

Mr. PALLONE. Okay. Let me ask Mr. Richardson if you would support a renewable portfolio standard? You mentioned tax incentives. What kind of tax incentives would you support?

Mr. RICHARDSON. Mr. Chairman, we have not specifically taken a position on the renewable portfolio standards provision of the Administration's bill or others. We do very strongly support continued investment and development of renewable energy sources.

We feel very strongly that hydro power is also a renewable energy source. We are concerned with respect to the mandates of the portfolio standards forcing, putting floors or ceilings. Forcing utilities to abide by those portfolio standard requirements may not be the most efficient or effective means of increasing development of renewable energy.

With respect to tax incentives, the members of my association are not-for-profit units of State and local government. Federal Tax Code incentives, automatic deductions, tax credits do not provide any incentive for members of my association.

Your legislation, and I have not had a chance to review it carefully does, I believe have a structure that treats all segments of the industry fairly. That is certainly very attractive for us to find solutions that treat all segments of the industry, yet provide incentives for the development of renewables in a way that applies across the board to all sectors of the industry.

Mr. PALLONE. Okay. Thank you. Let me ask Mr. Kean if you could clarify the EPSC's views on PURPA repeal or the language of PURPA repeal? Comment a little bit on PURPA.

Mr. KEAN. First of all, I think it is important to recognize what great progress PURPA has brought to this industry, in terms of increasing efficiency and the generation resources that have been brought on as a result of PURPA.

This is the first time we had competition with the vertically integrated monopolies. So, it has been a successful program from that standpoint. Going forward in an open and competitive market, is it necessary to have a mandatory purchase obligation in place? No, it is not.

We believe that the repeal should be No. 1, carefully crafted to deal with just the mandatory purchase obligation. It should be prospective only, and should bolster, rather than setting aside, existing contracts. So, it needs to be comprehensive.

It needs to be a part of a comprehensive package. It needs to be carefully done because people invested in contracts and literally

took those to the bank to finance the projects that they have and it should be prospective only.

Mr. PALLONE. Thank you. Thank you, Mr. Chairman.

Mr. BARTON. I thank the gentleman. The gentleman from Illinois, Mr. Shimkus, is recognized.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. Schmidt, I read in your testimony that you are a State-based organization. That you support plans for States to enact electric restructuring, which obviously I am very supportive of. However, I would like for you to clarify a few points. I am glad they kept that up.

Going down to point 6, which is the Consumer Protection Check Mark; as I read your list that is your testimony, nothing jumps out as something my State has not addressed. I will bet if you go throughout the 22 or 23 States, most of them have covered a lot of those issues.

For example, you advocate for disclosure of resource mix and environmental characteristics of generation. Are you aware that the Illinois law requires energy producers active in our markets to include this information in their customers' bills already?

Mr. SCHMIDT. Yes, I am. I think that is a very good bill. I am very familiar with Illinois' provisions. I do know that other States have not adopted language like Illinois' though. I think that now that we have gone through a lot of those State experiments, I would like to see some of those set as Federal minimum standards.

Mr. SHIMKUS. Well, what if there is a difference between what we end up passing than what Illinois has? What gets reported? What gets filed? Is there a duplication? Would you feel that is overly burdensome? I do want to point out the Illinois Commerce Commission and its environmental disclosure statements. You did mention the good work that was done by the State General Assembly.

I pulled up one from Illinois Power which has the fuel mix. This is actually the insert into the bills, along with the pie chart on where the fuel base comes from. How would you respond as far as the duplication of documents required?

Mr. CAVANAGH. First of all, I would not like to see any sort of expansion of Federal bureaucracy out of this. The only thing I am recommending is specific guidelines so that there would be standards, but not some sort of enforcement of bureaucracy at the Federal level to enforce those things.

I think what the States are doing is good. What is important to recognize is that if we are going to have successful marketers who are going to go out and market, particularly aggregated markets, small communities, they cannot have separate standards for disclosure in their types of bill format in 50 different States.

They have got to have some uniformity or there is going to be some significant inefficiencies under our ability to go out and market. So, I think what you need to do at this point is take what Illinois has done and what other States have done and set a set of Federal minimum guidelines for those things. I do not want to preclude a State from implementing something more stringent. So, there may be circumstances where that inconsistency would still be there.

I think that you should have a minimum set of Federal standards. If you do that, most of the States, particularly those who have not acted on the issue like Illinois has, will act consistent with that. Then you will have a uniform set of National guidelines that will make it very easy for competitors to go out and sell their product to consumers.

Mr. SHIMKUS. I think the point is possible minimums that States, as far as like my colleague from New Jersey, there may be States who want even more specific type information. You would then allow them to be more specific in the information they provide within their States?

Mr. SCHMIDT. Yes. They will preempt States from doing something if they, in their State, believe something more detailed is needed.

Mr. SHIMKUS. Do you not see that, that might become a difficult process with duplication bills? Mr. Cavanagh, you are shaking your head. So, I am going to give you a chance just to jump in.

Mr. CAVANAGH. Yes. Perhaps a small disagreement with Fred on only one point. I really do think, and we supported the State level disclosure efforts. We are at-risk of having a Nation of inconsistent food labels on electricity. I think that is one area where Federal uniformity might make sense. Fred is talking about the equivalent of a food label for an electricity product. It would be nice if you had similar content and similar standards across the country so people who cross State lines could make useful comparisons.

Mr. SHIMKUS. Thank you. I do not know where we are going, but I think that is a part of the debate when we get to define language in what we want to do. I think the concern is going to be, in my perspective, a knit-picking on sometimes what will be a controversial issue on a billing process can best be done by the State General Assembly in a particular State, based upon their concerns and desires of what the people have told their elected representatives they want to see.

I am just concerned that this Nation is a great diverse Nation. In Illinois when we just have another coal mine close down because of the Clean Air Act, we may be more sympathetic to job losses versus other concerns that people may be spouting forth as they feel is good business.

Number 11 on your check list deals with PUHCA reform. I also want to highlight and address what is going on in Illinois and throughout States, when there is a holding company that may go across State lines. One, Illinois being considered a high-cost State and Missouri being a low-cost State. Ameron has now merged.

The question is, again, Illinois has addressed the issue of cross-subsidization. The issue will be cross-subsidization. People espout that. In the Illinois bill, they address cross-subsidization. I quote, "Electric utilities shall not provide affiliated interests, or customers of affiliated interests, preferential treatment or advantages relative to unaffiliated entities' or their customers in connection with services provided under tariffs on file with the Illinois Commerce Commission." It goes on, and on, and on. I have obviously the legislation here.

What is wrong with, again, allowing the States to address a cross-subsidization issue?



Mr. CAVANAGH. There is nothing wrong with that. I agree it should be done. In my State we did it. Each State that does electric competition needs to adopt a comprehensive set of what I call affiliate transactions to ensure that the affiliates of the utility that stay in or get involved in the competition business are not treated dissimilarly or favorably compared to other competitors who want to enter the marketplace.

Mr. Shimkus. I think based upon the discussions we have had, and I am a former Army Officer, we had an acronym K.I.S.S., "Keep It Simple Stupid." For us to move, I think we have to be careful with loading up additional problematic issues at the Federal level that can best be handled by the States. If they are doing so effectively which I, of course in my universe of the State of Illinois, I think we did the best we could bringing the parties together. My position is we need to continue to move in that direction and be careful about federally mandating other things that are going to cause dissension in getting competition passed. Thank you, Mr. Chairman. I yield back.

Mr. BARTON. I thank the gentleman. The gentleman from Ohio, Mr. Sawyer, is recognized for his questions.

Mr. SAWYER. Thank you, Mr. Chairman.

Virtually, all of us, in one way or another, have talked about the critical importance of transmission, and the importance of getting the fundamentals right. If we do that right within transmission, we have a very good chance of getting it right in many of the other elements that we are talking about.

There are no guarantees, but it is so central to what we are talking about when we talk about competition, that it becomes a set of critical questions. We have come down to a couple of different directions in which we view the best way to evolve a modern transmission system suitable to very different purposes from the one which has evolved over the last 100 years, and one which is capable of evolving as communities, as needs, as funding resources, as technology itself changes in the foreseeable future.

Steve and Ed, in the Largent-Markey bill, have come to the conclusion, as many here have, that FERC ordering the affiliation in RTOs, or to give up control, or ownership of assets under a standard of what would be appropriate to competitive electric markets in reliability.

We have also heard, in the course of our hearings, that an awful lot of people believe that no one single structure or design is well-suited to every part of the country in the same way. In that sense, I am very interested in what kinds of characteristics and by what standards we think that a FERC order to facilitate the formation of transmission entities ought to take place. So, let me just ask, and I am thinking in terms particularly of Mr. Owens, Mr. Kean, Mr. Richardson, Mr. English, and Mr. Schmidt. Others can join in if you will.

If we are talking about what is appropriate for the promotion of competitive electric markets, I mean, do we need what is necessary for competition and reliability, or do we mean that which is least burdensome, or restrictive? Do we mean that it is unavoidably the only choice for competition reliability, or in effect should transmission organizations evolve in various parts of the country to

meet the needs of that part of the country? We will start here and just move on down.

Mr. OWENS. Congressman, you actually hit the nail right on the head. I think we have to provide flexibility. I do not support a bandaid. If you look at what is occurring in the industry, and I am speaking specifically with respect to regional transmission organizations. I might disagree with many of panelists this morning. I think we have a very impressive record of what is happening with respect to regional transmission organizations.

It has only been 3 years since 888 has gone into play and we already six independent system operators that are in operation. We have five other very significant proposals. In other words, 41 percent of our electric consumers are already getting the benefits of good regionalization.

What you do on the east coast, for example, three of those ISOs have evolved out of what we call centrally dispatched power polls. Those were pretty sophisticated systems. Given what is occurring in California, you cannot apply the ISO rules to New York, or to New England, or to the Pennsylvania, New Jersey, Maryland interconnection, which is the area that serves this part of the country.

In California, it cost \$400 million to create that system. So, I would say a voluntary system. One that encourages transmission expansion. One that puts all players under the same set of rules, and one that preserves the reliability rules, and another one, one that also recognizes that we need to clarify the siting jurisdiction of FERC in the States.

Mr. SAWYER. Mr. Kean.

Mr. KEAN. I think your suggestion that there are different approaches that will be best suited to individual circumstances is right. I think in order for those good proposals to come forward and be developed, there have to be some kind of basic ground rules set. I mentioned one of them already and the other panelists have mentioned them.

One is that it has to be clear that transmission access is going to be non-discriminatory for all uses. That includes everybody's State as well. Second, structural separation as a remedy for the Commission is important. Once you have that, you will have transmission companies looking at transmission as a business.

They will be looking for ways to make that work because they will want to be able to sell the service they have. They will want to be able to expand the system to serve new needs. So, I think if you lay those rules in at the front end, you will get good proposals.

Mr. SAWYER. Mr. Richardson.

Mr. RICHARDSON. I agree with a lot of what Steve just said. I think it is a question of what is appropriate and when is it appropriate? We do support the enhanced FERC authority to order utilities to do this. I think if the appropriate guidelines are established by which independent system operators, regional transmission organizations, or whatever the acronym might be, will pass muster or will not pass muster with the authority of FERC to order utilities to participate. By utilities, I mean all transmitting utilities, not simply investor-owned utilities, but public power systems as well. That is part of our policy.

Mr. SAWYER. You are trying to be very kind to me, but I really would like to hear briefly from each of you. Thank you. Mr. English.

Mr. ENGLISH. Mr. Sawyer, I think what you are really getting into is that this is another one of those devils in the detail issues. I think the real question the committee is going to have to face is whether you want to take a kind of one size fits all. We really do not want to get into all of this stuff.

Let us kick it over to FERC. Let them sort it sort it all out. We do not have to mess with it, or when you are in fact going to get at the reality at what is going to work for the country? Now, that means you are going to get down to some details, and it is not going to be neat. It is not going to be orderly.

For instance, we have a lot of our small distribution cooperatives that may have a mile or two of line that could be interpreted by FERC to fall in under their jurisdiction. No one is saying that they really believe that those distribution cooperatives are going to go through the expense and the difficulty in hiring all of the expertise to get exempt. It does not make any sense.

On the other hand, well that means we have to write something a little bit differently in the language, and we have to provide exemptions. We have to carve it out. It will be difficult. We are hopeful that the committee will take the time and will focus on the reality of trying to get a system that really works as opposed to a uniformed system.

Mr. SAWYER. Mr. Schmidt.

Mr. BARTON. This will be our last answer.

Mr. SCHMIDT. I agree with you. We need regional differences. We need to recognize those differences, but that is not the same as saying we do not need to do anything or go slow, as Mr. Owens said. We are not moving in competition in a lot of areas in the country. The main reason is we do not have regional transmission organizations.

FERC is the only entity, unless you want to create regional regulatory entities. Some entity that crosses State lines needs to have that power. You need to authorize that. If you do not do that, you will not get competition moving very rapidly in most of the country in the near future.

Mr. SAWYER. Thank you for your latitude, Mr. Chairman.

Mr. BARTON. I thank the gentleman. The gentleman from Oklahoma, Mr. Largent is recognized for his opening statement and his questions.

Mr. LARGENT. Thank you, Mr. Chairman.

I want to ask just a quick yes or no question. That is did I understand you to say that you do not believe that FERC should have the authority to order a utility into an RTO?

Mr. OWENS. I think that FERC should not have mandatory authority or should not require the formation of regional transmission organizations.

Mr. LARGENT. What about if they show market power exist? Should that be one of the remedies if FERC says, here is market power. Get into an RTO?

Mr. OWENS. I think there are a range of options that FERC has to do on a specific finding of market power. You can allege, but you have to make a finding that there is actual abuse.

Mr. LARGENT. Assume there is a finding. Should one of the remedies be that they can order that offending utility into an RTO?

Mr. OWENS. FERC has at its disposal, FERC can suspend market-based rates.

FERC can do a number of things aside from trying to institute what we call structural remedies.

Mr. LARGENT. Mr. Cavanagh, I wanted to enter into a discussion with you about the whole environmental issue. Is it your view that going to competition is going to be good for the environment, even if there is not a renewable portfolio in the bill?

Mr. CAVANAGH. No, because it is my view that everything depends on how you do it. That is our argument and my testimony tries to do this in detail. It is not inherently good or bad. What is crucial is do we have consistent pollution rules for all of the competitors? Do we have incentives to maintain our historic investments in efficiency and renewables.

Mr. LARGENT. So you are saying the answer to my question was no?

Mr. CAVANAGH. If stripped of the environmental content, we think this restructuring would be bad for the environment, Congressman.

Mr. LARGENT. Okay. Let me ask you this question. Under the Clean Air Act, a lot of the older, dirtier generators of electricity were grandfathered in. Is that correct?

Mr. CAVANAGH. Right; yes.

Mr. LARGENT. Is it not possible, and we have heard testimony before this committee that a lot of those generating facilities are average age about 43 years. That they operate at an efficiency level of about 35 percent, meaning they are not really very economical unless they are held captive within a monopoly. So, is it not likely, in fact probable, that as we move to competition, that a lot of those older generating facilities that you cannot touch through the Clean Air Act would actually be cycled out as a result of competition? Thus, meaning that competition will do what the Clean Air Act has not be able to do, and in effect be better for the environment, even without getting in to the renewables.

Mr. CAVANAGH. Congressman, if we can hold everyone to consistent pollution standards in the competitive process, you are absolutely right.

Mr. LARGENT. Forget pollution standards. What I am saying is, let us talk about market efficiencies, competition, the low cost producers. Let us talk about all of those things.

Mr. CAVANAGH. The problem is that those incumbents have an economic advantage by virtue of the looser standards of commerce. In our testimony, we gave you the figures. In the first 2 years after restructuring, the older coal plants expanded market share by 8 percent. The cleaner gas plants lost 5 percent of market share. Now, that is not the permanent rule. That is a short-term trend. I hope it turns around. It is a cautionary note.

It says to us that we cannot just assume that opening up the market yields an instant environmental dividend. That had been

my hope too. That is not what we are seeing. That is why we are urging you to look at the standards.

Mr. LARGENT. I would ask you to continue to explore that question. Let me ask you another question.

Mr. CAVANAGH. Sure.

Mr. LARGENT. What percent of Americans do you believe would choose renewable energy, even if it cost them a little bit more?

Mr. CAVANAGH. Congressman, we do not know the answer to that. My hope is a substantial number. We are encouraging them to choose. Here is, again, the cautionary tail. We have got a year after the markets open in California. About 1 percent of Californians have chosen a supplier. The overwhelming majority have chosen renewable.

Most are not choosing. Most customers just cannot make sense of the new market. There is a lot of confusion, a lot of uncertainty. What I would say to you is we are glad to have that environmental dividend from voluntary choice. We celebrate it. We do not want to rely exclusively on volunteers to meet the Nation's environmental objectives. We do not want to deregulate environment.

Mr. LARGENT. So, what is the answer to my question?

Mr. CAVANAGH. The answer to your question is at least 1 percent.

Mr. LARGENT. What about New Hampshire? They have folks up there. That is pretty vibrant choice.

Mr. CAVANAGH. The New Hampshire residential, the pilots looked great, Congressman, then the bottom fell out of the market. Nobody is making money in the residential markets today in electricity. It is a real problem. Now, we hope to see it open up. We hope that 10 percent will choose renewable, but we certainly are not there yet.

Mr. LARGENT. You have industrial consumers that are actually using, as a part of their portfolio, renewables.

Mr. CAVANAGH. A few.

Mr. LARGENT. That is the way they market themselves.

Mr. CAVANAGH. A few.

Mr. LARGENT. Yes.

Mr. CAVANAGH. We would love to see more.

Mr. LARGENT. So, you are not really giving me a percentage. Is that 1 percent, 5 percent, 10 percent, 20 percent?

Mr. CAVANAGH. In California, the answer is 1 percent.

Mr. LARGENT. Now, 1 percent have elected to change their electric supplier?

Mr. CAVANAGH. The overwhelming majority of them have chosen renewable; the overwhelming majority.

Mr. LARGENT. The ones that have been knowledgeable enough to say I have an option here, so what percent of the 1 percent?

Mr. CAVANAGH. Almost all of them.

Mr. LARGENT. If you are saying the 1 percent is 100 percent, how many have chosen renewables?

Mr. CAVANAGH. Almost all of them.

Mr. LARGENT. So, a large percent.

Mr. CAVANAGH. A large percent of those who have chosen, but such a small fraction have chosen that there is not much of an environmental dividend to show at this point.

Mr. LARGENT. Would you guess, if we had informed choice, assume informed choice, say in a 5-year period we have informed choice on electric, would you say that maybe as high as 5 to 10 percent, maybe even 15 percent of consumers, and even some industrial consumers would choose renewables?

Mr. CAVANAGH. That would sure be my hope. We are with you there.

Mr. LARGENT. Thank you, Mr. Chairman.

Mr. BARTON. I thank the gentleman. The ranking member, Mr. Dingell from Michigan, is recognized for questions.

Mr. DINGELL. Mr. Chairman, I thank you. Ladies and gentlemen of the panel, welcome. I have a number of questions to try and determine whether or not there will be a consensus on this complex matter. The time for my questions is limited. Therefore, I will ask only for a "yes" or "no" answer.

We will commence with Mr. Owens. The first question is as a general matter, should Congress address the environmental policy in the context of restructuring legislation; "yes" or "no?"

Mr. OWENS. No.

Mr. DINGELL. Pardon?

Mr. OWENS. No.

Mr. DINGELL. Ma'am.

Ms. PRICE-DAVIS. I do not have an answer to that question right now. AAE has not gotten a position to implement.

Mr. DINGELL. Yes, sir.

Mr. KEAN. Yes, if it is needed to get the deal done.

Mr. DINGELL. Yes, if needed to get a bill?

Mr. KEAN. Yes.

Mr. ENGLISH. Yes.

Mr. CAVANAGH. Yes.

Mr. SCHMIDT. Yes.

Mr. DINGELL. Now, let us talk about a naked policy; yes or no?

Mr. OWENS. I think yes.

Mr. DINGELL. All right.

Mr. ENGLISH. No.

Mr. CAVANAGH. I am sorry, Congressman, I do not even know what the "it" is again.

Mr. DINGELL. I am sorry?

Mr. CAVANAGH. The "it" you are asking about?

Mr. DINGELL. Should Congress address environmental policy in the context of restructuring legislation.

Mr. LARGENT. You are a yes.

Mr. CAVANAGH. I am a yes, Congressman.

Mr. DINGELL. Sir?

Mr. SCHMIDT. Yes.

Mr. DINGELL. Next question: should Congress specifically address the Clean Air Act in restructuring legislation? Mr. Owens.

Mr. OWENS. I am sorry. I was distracted.

Mr. DINGELL. Should the Congress address Clean Air Act concerns in restructuring legislation?

Mr. OWENS. No.

Mr. DINGELL. Ma'am?

Ms. PRICE-DAVIS. No.

Mr. KEAN. No.

Mr. RICHARDSON. No.

Mr. ENGLISH. No.

Mr. CAVANAGH. Mr. Chairman, I will say yes and wish I could say more.

Mr. SCHMIDT. No.

Mr. DINGELL. Okay. Next question: should Congress reestablish renewable energy requirements for generators and sellers of electricity?

Mr. OWENS. No, if they are mandatory.

Mr. DINGELL. Ma'am?

Ms. PRICE-DAVIS. Again, I would prefer to leave that at the option of the generator.

Mr. DINGELL. So, in other words, the answer to that would be no.

Ms. PRICE-DAVIS. Correct.

Mr. DINGELL. Okay; sir?

Mr. KEAN. Sir, this is very hard to answer.

Mr. BARTON. The gentleman will get the microphone.

Mr. DINGELL. Congress either should or should not.

Mr. KEAN. That would be one way to do it. That would be one way to do it.

Mr. DINGELL. Pardon?

Mr. KEAN. That would be one way address environmental issues.

Mr. DINGELL. Are you for or against? Which is it, yes or no?

Kean. Yes.

Mr. DINGELL. Okay. Sir?

Mr. RICHARDSON. No.

Mr. ENGLISH. No.

Mr. CAVANAGH. Yes.

Mr. SCHMIDT. Yes, but it should be done at the wires level, not at the generator level.

Mr. DINGELL. Okay. Next question; let us talk about increasing FERC authority to deal with market power issues. Question: should Congress authorize FERC to require utilities and other transmission owners to join regional transmission groups or RTOs?

Mr. OWENS. No.

Mr. DINGELL. Ma'am?

Ms. PRICE-DAVIS. Yes.

Mr. KEAN. Yes.

Mr. RICHARDSON. Yes.

Mr. DINGELL. Mr. English?

Mr. ENGLISH. Yes.

Mr. CAVANAGH. Yes.

Mr. SCHMIDT. Yes.

Mr. DINGELL. Should Congress authorize FERC to require divestiture of utility assets in order to mitigate market power?

Mr. OWENS. No.

Ms. PRICE-DAVIS. We believe it should be an option.

Mr. KEAN. Yes.

Mr. RICHARDSON. Yes.

Mr. ENGLISH. No.

Mr. CAVANAGH. An option.

Mr. SCHMIDT. Yes.

Mr. DINGELL. Next question: should Congress adopt more stringent standards for FERC approval of mergers?

Mr. OWENS. No.

Mr. DINGELL. Ma'am?

Ms. PRICE-DAVIS. Yes.

Mr. KEAN. No.

Mr. RICHARDSON. Yes.

Mr. ENGLISH. Yes.

Mr. CAVANAGH. Yes.

Mr. SCHMIDT. Yes, and it should be a public benefits test, absolutely.

Mr. DINGELL. PUHCA repeal; do you support PUHCA repeal on a stand-alone basis, not at all, or only, or I am not sure how we get a yes or no answer.

Question: do you support outright repeal of PUHCA?

Mr. OWENS. Yes.

Ms. PRICE-DAVIS. Not until competition exists.

Mr. KEAN. As part of a comprehensive package.

Mr. RICHARDSON. Comprehensive and not until competition exists.

Mr. ENGLISH. No.

Mr. CAVANAGH. Comprehensive and not until competition exists.

Mr. SCHMIDT. It has to be part of a comprehensive package, otherwise no.

Mr. DINGELL. Let us talk about PURPA repeal. Should PURPA be repealed on a stand-alone basis? Mr. Owens.

Mr. OWENS. With PUHCA repeal, yes.

Mr. DINGELL. In other words, you are in doubt.

Ms. PRICE-DAVIS. On a stand-alone basis, no sir.

Mr. KEAN. No.

Mr. RICHARDSON. No.

Mr. DINGELL. Mr. English?

Mr. ENGLISH. No.

Mr. CAVANAGH. No.

Mr. SCHMIDT. No.

Mr. DINGELL. Should Congress provide for the recovery of stranded costs under PURPA; yes or no?

Mr. OWENS. Yes.

Ms. PRICE-DAVIS. Yes.

Mr. KEAN. Yes.

Mr. RICHARDSON. No position.

Mr. ENGLISH. No position.

Mr. CAVANAGH. Yes.

Mr. SCHMIDT. It is not necessary. You have the Tenth Amendment.

Mr. DINGELL. You also, if I recall, have the Tucker Act. This committee, to its prodigious distress, learned about the Tucker Act when we had to pay out \$7.5 billion to create Penn Central Corporation because we were careless in the setting up of the restoration of the rail service in the Northeast. Ladies and gentlemen, I thank you for your comments.

Mr. BARTON. Thank you. The gentleman from North Carolina, Mr. Burr, is recognized for his questions.

Mr. BURR. I have a great deal of respect for my good friend, John Dingell. I want to thank him for drawing on the consensus of our



panelists today. I think it also shows the challenge for members. I think that all of the answers were genuine.

I do not think there is anybody who is in the industry who would not lobby for an unfair advantage. Not everybody can get it. That is the unfortunate thing. So, I think that certainly the answers were consistent with, not only your statements now, but your statements in the past.

As we move forward, hopefully we will be able to find the balance that I think all would agree has to be met, forced to in fact address many of the questions that Mr. Dingell and other members have asked. Let me just move to a specific things. Mr. Schmidt, define market powers for me.

Mr. SCHMIDT. Market power is when there is too much of a concentration and control of a particular industry with a small industry sector or entity.

Mr. BURR. Would our current structure in those States who have not deregulated, not opened their retail markets because they are monopolies, would that be market power?

Mr. SCHMIDT. Where you have a monopoly that is regulated, that is market power. It is regulated, which is why it is accepted.

Mr. BURR. So, as long as it is regulated, we could accept market power?

Mr. SCHMIDT. That is the definition of public utility regulation, yes.

Mr. BURR. Would that be the case that we should not worry about market power as long as we regulate it in an open marketplace?

Mr. SCHMIDT. I would prefer a model of competition in open markets myself.

Mr. BURR. Can you have regulated power and have an open marketplace?

Mr. SCHMIDT. You can if you have a natural monopoly that is more efficiently existing as a monopoly. I think that is still where we are as a wires utility. I do not think anyone is advocating that we should duplicate the wires that run down the streets to everyone's home and business. That is a natural monopoly. Unless you regulate it, there can be market power exercised there that would be very detrimental to your constituents.

Mr. BURR. So, if we successfully address transmission, which Mr. Sawyer is desperately trying to come up with the right language, and we are all supportive of his efforts, and we are able to break that out of generation, if generation were to stand on its own by definition, nobody would have a market power advantage, as long as competition existed.

Mr. SCHMIDT. If it existed. The problem is you do have pockets called load pockets of generation that was built with the wires that are in place where there is not other generation today, and the only people in that area without additional transmission can—

Mr. BURR. Let me ask because your State had already done this. This is a very important question for the committee. If you had a situation where you had an area where there was a population, and limited generation, and retail competition in that area, what is the likelihood that an entrepreneur or a company, seeing that, would build generation to try to feed that population?

Mr. SCHMIDT. I would hope that is going to happen when we open up the market.

Mr. BURR. Can we do that without removing the Federal barriers that exist?

Mr. SCHMIDT. I am not sure which Federal barriers you are referring to. I hope we can do that.

Mr. BURR. We are all hopeful we can do that. Let me go to your chart, if I could. I went down it. Again, I think that Nevada, like other States, has moved forward. I am concerned with a re-regulation. Let me just ask you about one specifically. Do you feel that FERC is the only agency that could authorize mergers successfully?

Mr. SCHMIDT. No. I think the Department of Justice is very good at doing that as well. We work with them in our State. I am with my own State Department of Justice essentially. I have done seven major mergers in the last 6 years within my own State government. I did not worry about my public utility commission or the FERC in many of them.

Mr. BURR. If you were to rate today the FCC on their merger actions in the new telecommunications world that we are in, how would you rate them?

Mr. SCHMIDT. I hesitate to do that, but I smile with you.

Mr. BURR. So, clearly if we took mergers and we moved them to the DOJ and the FTC, and they used the FERC as an expert, but they were the ones that wrote the decision, since they do a majority of the merger decisions, you would feel comfortable with that?

Mr. SCHMIDT. Let me tell you why my chart says allow FERC to do it. FERC, in doing a rulemaking about 1½ to 2 years ago, adopted or essentially referred to the Department of Justice's Standards For Evaluating Mergers. I think it is critical that the agency that evaluates a merger have knowledge of the industry.

That is why I think FERC has some involvement or role. This tricky question as to whether it should be DOJ or FERC, I do not have a real strong opinion on that. The most critical part is that someone do it, someone do it that has knowledge of the industry.

Mr. BURR. And someone do it that has knowledge of everything that is tied to merger decisions, even the capital questions that follow it, both understanding how they affect the merger, but also understanding if delays in decisions are made, how that capital is affected.

Mr. SCHMIDT. Yes. Do not misread my chart. Although there are a lot of things there that only FERC could do, I see a substantial amount of diminishment of certain things FERC does. In my own State, my experience has been our State Commission has really had to shift the type of entity it is.

It has gotten rid of auditors and it has replaced them with economists. It has gotten rid of some of the engineers who did all of the planning work and micro-managed what the utilities were going to build or not build, and it has replaced those with market experts who are trying to evaluate making sure we have the right guidelines in place to entice companies to come and build power plants in our State.

So, it is a change in regulation. I also see it as a diminishment, which hopefully makes you happier. It is a diminishment of Federal activity in a number of areas. There are these areas where the

Federal Government, if it does not play a role, natural market powers that exist today will take a long, long time before you get significant retail competition.

A good example of that, as Mr. Cavanagh to my right here has said, is California. California opened its market. For small customers, there is virtually no competition. Why? Because they regulated parts of it in a manner in which I think they should not have regulated.

Mr. BURR. I think the lesson from California is deregulation, not reregulation. That is why I started with it in my statement. Mr. Chairman, if I could just ask Mr. Cavanagh one question.

Mr. BARTON. One more and then we will have to go to Mr. Hall.

Mr. BURR. Mr. Cavanagh, you talked about in the Administration's bill, the renewable portion, you spoke very favorable of.

Mr. CAVANAGH. Yes.

Mr. BURR. Let me just ask you relative to their bill, as I read it, and I think as they have stated it to me, a State or an entity has the opportunity to opt-in or opt-out.

Mr. CAVANAGH. Right.

Mr. BURR. Under the opt-out, though, that entity or that State would be required to fulfill the 7.5 percent renewable portion found in the bill.

Mr. CAVANAGH. Yes.

Mr. BURR. Do you believe that if they opt-out they should be held to that new Federal standard?

Mr. CAVANAGH. I do, Congressman, even as I think they should be held to other environmental standards. It is an interstate matter. Even Texas is not big enough to contain all of these pollutants.

Mr. BARTON. You are meddling now.

Mr. BURR. I thank the Chair for his indulgence.

Mr. BARTON. The distinguished ranking member of this subcommittee, Mr. Hall, of the great State of Texas, for 5 minutes.

Mr. HALL. Mr. Chairman, thank you.

You know when we received the first bill when the former chairman of this subcommittee introduced his bill, there was a lot of talk, and mumbling, and rumbling going around about stranded costs. I think that I did not perceive that this committee had its mind made up. That we listened to a lot of folks that said let them eat those stranded costs.

Well, that is an invitation to the courthouse and everyone knew that would not work. We have had a lot of hearings all over the country, even Ms. Price-Davis in Richmond. I do not know why or how this committee got sent to Richmond for a hearing, but we had a nice hearing there; in Chicago, Atlanta, Dallas, and many hearings here.

It seems to me, this committee is in unison on not whether or not we are going to pay stranded costs, or whether or not they are entitled to be reimbursed or paid for those, but how are we going to do it? That seems to be the way everybody feels now. If you have a different feeling to that, I would listen to it.

I think we have felt it was a little far-fetched to say these boards of directors, who are honorable men and women, who had the best interest of those that they served, were not going to foolishly throw

any money away. They may have made some bad decisions, but at the time I think they thought they were good decisions.

If they thought that, and I think you have to in law presume that, and it takes testimony to remove it, that we have stranded costs now. So, I have arrived to the point where I want to get before I ask my question. I had to work myself into that type frizzy.

Ms. PRICE-DAVIS, I think I like your idea on stranded costs. I am not sure. I want to ask you, it seemed that you were a little vague, but probably it is because you have already given us a nice long statement. You did not want to stay too long on one subject, but you say given that if possible Federal legislation should guarantee that stranded cost recovery does not impeded competition. It is a great statement and I like that.

It should not reward the inefficient at the expense of the efficient. Common sense; that makes sense. It is a fact question. It would take you to the courthouse. It should not impede technology and innovation. I do not disagree with you on any of those. Who ought to make that decision? Do you not think the States are in a better position to make such a decision?

Ms. PRICE-DAVIS. I believe the States are in the position to make the case-by-case decision on the factual basis. However, I think they need Federal guidelines.

Mr. HALL. Well, do you think they need Federal instruction? Is that what you are saying?

Ms. PRICE-DAVIS. I am thinking that they need a framework. For example, they need to make sure that the stranded cost recovery that is allowed—

Mr. HALL. You want the Federal Government to override a State's findings?

Ms. PRICE-DAVIS. No, sir.

Mr. HALL. Then what kind of guidelines do you want to give them?

Ms. PRICE-DAVIS. I would like the Federal Government to state that any stranded cost recovery allowed should be based on net, non-mitigable stranded costs. There has been a great deal of controversy in the States, at the various commissions, over the definition of stranded costs and the positions taken between the utilities and the consumers on what is a stranded cost. We are looking at whether net market value, proposed market value, or whether an option is required of the properties.

Mr. BARTON. Would the gentleman yield?

Mr. HALL. Sure, I will yield.

Mr. BARTON. But every State that has addressed deregulation and restructuring has accounted for stranded costs. Is that not correct?

Ms. PRICE-DAVIS. To my knowledge, yes sir.

Mr. BARTON. Is there anything wrong with letting each State do it the way they think is best for their State as opposed to the Federal Government trying to mandate how it is done?

Ms. PRICE-DAVIS. I think, sir, though that we have seen that the lack of similarity between how the States are handling it is presenting some problems in certain States. Some States have handled it very well. Other States have in fact slowed down the path to

competition by the way they determine stranded cost recovery should occur.

Mr. BARTON. So, you really support a Federal mandate that would preempt the legislature in Sacramento or the legislature in Austin, or the legislature in Little Rock, or Richmond, Virginia?

Ms. PRICE-DAVIS. No, sir because what I am asking for is not a Federal mandate. What I am asking for, as I said, are Federal guidelines; something that gives guidance to the States when they look at stranded costs.

Mr. HALL. Would you have those guidelines to be mandatory or precatory? If you say precatory, I will go to the next question. Say it. It is precatory. I do not believe you want the Federal Government telling the State of Virginia how to handle their stranded costs. I really do not believe that, but you may. You have a right to.

Ms. PRICE-DAVIS. I believe that the Federal Government needs to provide the State of Virginia with some guidance. I have seen how in the Virginia bill that has played out.

Mr. HALL. I agree. They ought to help them all they can. You are not going to tell me that you think the States want to mandate those types of guidance from the Federal Government to the States, are you?

Ms. PRICE-DAVIS. No, sir.

Mr. HALL. Thanks. You have been a good witness.

Now, I do not expect to get such good treatment from Mr. English. I want to talk to him. In your testimony, Mr. English, you argued that coops, electric coops, ought to continue to have access to the Rural Utility Service Loan Program and preference power from the PMAs. Are you familiar with the new style cooperatives that have shown on the horizon? Should they be included on that? Tell me whether they should or not.

Mr. ENGLISH. They are not eligible, as it is, under existing law, for any kind of loans under the Rural Utilities Service. So none of the new aggregation cooperatives, such as I mentioned in New York and California, are eligible for any RUS funding at all.

As far as the PMAs are concerned, preference power, that too is set out by law. I would simply point out two points with regard to the existing borrowers from the Rural Utilities Service. Even though we have about 10 percent of the consumers of the country, we have nearly half of the infrastructure.

That infrastructure, just like interstate highways, are going to have to be maintained. Whenever I left the Congress and I was a member of the Agriculture Committee, if I remember correctly, in January 1994 the cost of that program to the Federal Government was some \$150 million. This year it is less than \$30 million.

It has been reduced substantially, but it still has to maintain the same infrastructure, but none of the new cooperatives deal with that. On PMAs, again, those people who are a part of that agreement, those are the folks that came in and gave the assurance, in some cases, when the power that was being sold by the PMAs, just after construction of those dams was higher. They are not only paying for the cost of the power, the cost of building the dam, they are also paying for environmental programs that are underway, irrigation projects, recreation; a whole host of activities.

Those are regional facilities that are benefiting the people in that area, and the people themselves are paying for that cost. They are paying for every prescribed Congressional cost that has been outlined under the existing law. I would say that bond or that contract is just as valid as any of those contracts we are talking about on stranded costs and should remain.

Mr. HALL. Let me see if I can get you 5 more minutes, Glenn. Could I have another minute, Mr. Chairman?

Mr. BARTON. We are giving you a Texas 5 minutes, so you can continue. Mr. Rush is waiting patiently. So, he reserves the right to object.

Mr. Hall. Do you glean anything in any of the bills that you have examined, including Mr. Pallone's if you have seen a summary of it or anything, that would give these entities that have no distribution facilities of their own a change in the law? Is that in any of these bills?

Mr. ENGLISH. Mr. Chairman, let me first of all, draw on my Congressional experience and say that the chairman was taking count on how many votes for each of the bills. I hope you will mark up, Mr. Chairman, a vote for each of the bills for me. I love them all.

Let me very quickly say the thing that troubles me the most in what I am seeing in all of the bills, most troublesome factor that I have seen is the lack of recognition of the fact that individual consumers and citizens of this country should have the right to do this for themselves.

I see, unintentionally, some impediments that are being put into some of the legislation in this effort to just kind of grossly address major problems that may affect the big power companies, or may affect others that want to get into this business. That is the biggest concern I have at this point.

Mr. HALL. Before I yield back my time, Mr. Chairman, I want to say I cannot wait until we get this written down where I can read it and see what Mr. English has said.

Mr. BARTON. Before I recognize Mr. Rush, Mr. Stearns chaired the hearing while I went to my Delegation lunch. Apparently, after I left there is about 40 votes for Stearns, and no votes for anybody else. So, we may have to do a recount on that. The very patient gentleman from Chicago, Congressman Rush, who is recognized for a Chicago 5 minutes.

Mr. RUSH. Thank you, Mr. Chairman. Mr. Chairman, I really want to commend you for this hearing. I want to commend all of the witnesses. It has been really interesting this morning. I have a couple of questions and I want to direct my initial question to Mr. Cavanagh.

It was suggested that we adopt a Federal renewal portfolio standard to guarantee that a minimum level of additional renewable generation be developed in this country. The RPS will require the electricity sellers to cover a percentage of their electricity sales with generation from non-hydro electric renewable technologies, such as wind, solar, biomass, or geothermal generation.

The RPS requirement initially will be set close to the ratio of RPS-eligible generation to retail electricity sales projected under baseline conditions.

Mr. BARTON. Congressman, for some reason, they were getting some feedback through your microphone. You might come a little closer this way and try that one because it seems to be causing a problem.

Mr. RUSH. Additionally, there would be an increase in RPS requirements in 2005, followed by an increase to 7.5 percent in 2010. The RPS would be subject to a cost cap and would sunset in 2015. It seems that a must-die provision, like PURPA or PUHCA should be repealed because it is inconsistent with the compatible electric market.

With that said, this is the question. Does the possibility exist that the renewable mandate proposal will lead to lower prices for consumers? Should we consider something like what Illinois has done, provide for a renewable energy fund to support renewable generation technologies?

Mr. CAVANAGH. Congressman Rush, I just tried to make the point that I think what the administration is proposing and Congressman Pallone are proposing, in both their renewable portfolio standards and their public benefits trust, is an effort to support and build upon what States like Illinois have done. That is I do not view these as incompatible approaches.

Basically, these are market-based financial incentives to expand the contribution of renewables and efficiencies at the lowest possible cost. That is absolutely in the spirit of what the best of the States have been doing, and it is what the Federal Government would be doing. It would be encouraging more States to follow the lead of States like Illinois.

Mr. RUSH. Mr. Schmidt, would you comment on my question also?

Mr. SCHMIDT. My national association has not taken a position on portfolio standards. I will tell you in my own State, I personally supported one. I think the critical aspects of it are that it needs to be clear that it applies to new resources.

It should not be a windfall, by definition of the percentage, for the existing renewables who have already made the investment, have taken the risk, and are already in existence. It should be a standard that applies to developing new resources.

Also, I think that it is important that you recognize in that metering issue, renewables can be developed in a portfolio standard to encourage central power plant development. The most efficient renewables that are beginning to emerge are onsite generation.

Without net metering legislation, which has now been adopted by 20 States, it is not going to happen in other States. The momentum is encouraging on net metering, but the standards have been inconsistent in the different States, and there are still 60 percent of the States that have not adopted it.

So, our association does support net metering energy legislation. That may be part of a Federal bill. We would encourage and support that. We also encourage if you do some sort of portfolio, make sure it applies to new resources and does not become a windfall for any existing generators.

Mr. RUSH. Mr. Schmidt, on your chart there, I cannot see exactly what number that is, but under universal services, you have indicated that the Federal Government should look at standards and

principles in terms of universal services. Can you expound upon what those standards and principles would entail? What would they look like?

Mr. SCHMIDT. There is a general standard in the Largent-Markey bill that I find acceptable. I do not think you need to go a lot beyond that. I think what you need is a standard. It is important to have in Federal law that is still a policy of this Federal Government to have everyone in this country have affordable electric service. I think that is very important.

Sometimes we get caught up in the competition. I will tell you, in my own State a number of utilities have looked at trying to get out of the obligation to serve. It has been a debate that has occurred in several States now. That is a negative step, if that is what moving to competition is about.

We need to have, as a first policy, we are trying to make sure everybody has electricity. That is what has made this country great. The fact that we expanded to the rural areas, even at an investment cost to the Federal Government. We do have low-cost affordable electric in most area of this country.

Just like in telephone where you did a universal service standard, you should do a universal service standard for the Federal Government. I am not saying do a fund like in telephone or in some other areas, but I am saying have a standard so that, that is a principle Nationwide.

Mr. HALL. So, you would not be in favor of the administration's Public Benefits Fund, the \$3 billion Public Benefits Fund, that the administration is proposing?

Mr. SCHMIDT. My association does not have a position on the exact Public Benefits Fund that is in the administration's bill. We do support low-income, low-cost programs that assist ratepayers in being able to afford electricity.

We have been consistent over the years in supporting the LAHEAP Program, which has kept affordable electric service for many years. We do not have a position on the level or the type of fund that is in the administration's bill.

Mr. BARTON. Will the gentleman yield on that point?

Mr. RUSH. Yes.

Mr. BARTON. Your association does not have a problem if States maintain these programs. As far as I am aware, every State that has acted has maintained some sort of a low-income assistance program. Is that not correct?

Mr. SCHMIDT. I wish I could say that were true, but my own State is an example where we did not adopt a program.

Mr. BARTON. What State is that?

Mr. SCHMIDT. Nevada.

Mr. BARTON. Nevada.

Mr. SCHMIDT. Frankly, there are a lot of States in the southeast and in the western United States that do not have a low-income program.

Mr. BARTON. Is there anybody in Nevada that is low-income? It seems like I contribute quite a bit to the economy every time I go out there.

Mr. SCHMIDT. Well, I could gamble and say no, but we do have those people. We are assisted through LAHEAP. Our association



does have a position though on if a Public Benefits Fund is established, that it be a matching program and that it be consistent with States participating in those programs and allow the States to administer the programs, and not create a new Federal bureaucracy to administer the programs.

Mr. BARTON. I yield back to Mr. Rush.

Mr. RUSH. You wanted to say something?

Mr. CAVANAGH. I wanted to associate myself with that, but just remind the chairman, rule of thumb. The last 3 or 4 years, 50 percent reductions across the board in these public benefits investments, including low-income. So, yes, the States are continuing to do it, but at a much lower level. Hence, the restoration plea.

Mr. RUSH. Mr. Chairman, I have one final question. Either Mr. Schmidt or Mr. Cavanagh can answer. Should the Federal public benefits standards preempt any State benefits standards?

Mr. CAVANAGH. I think I answered that, no. I think the State programs should be consistent with, and they should be matching programs to the extent possible.

Mr. SCHMIDT. I will gladden the chairman's heart by agreeing.

Mr. RUSH. Okay. Thank you, Mr. Chairman.

Mr. BARTON. Thank you, Congressman Rush.

Before I recognize Mr. Wynn, I believe the unemployment rate has declined quite a bit in the last 2 or 3 years too. That might have something to do with some of these programs going down.

The distinguished gentleman from Maryland, who has been very patient, Mr. Wynn, for 5 minutes.

Mr. WYNN. Thank you very much, Mr. Chairman.

Mr. Schmidt, I believe your fifth item had to do with reliability and essentially a FERC oversight of an independent industry reliability organization, if that is a fair characterization. My question basically is to the panel. Does anyone on the panel object to that kind of FERC oversight as a mechanism to address the reliability issue?

[No response.]

Mr. WYNN. Okay, great.

My second question is to Mr. Schmidt, in view of the fact that, what, nearly two dozen States have already moved toward deregulation, would it be appropriate to begin to put that mechanism in place now with FERC oversight?

Mr. SCHMIDT. Yes. I think it is time to do it now. The standards of the legislation really that has been drafted by the NERC representatives is something that we were here a couple of months ago before this committee and supported. We continue to support that.

Mr. WYNN. Okay. Thank you.

Your third item, market power, I do not know if this is an accurate analogy, but in telecommunications, we have essentially tried to address the same issue with, at best, mixed results. Given the trend toward mergers, market concentration and the like, can you expound a little bit on what role you see the Federal Government playing in this whole market power issue?

When you start talking about limiting, concentration, mergers, these types of things, structuring market power, I become a bit uneasy as to whether or not the Federal Government is getting into an area where maybe it ought to play but really, for practical mat-

ters, cannot play given the fact that this is a very capital-intensive industry. How is this going to work in your mind? I would like to hear other opinions as well.

Mr. SCHMIDT. My preference is structural separation. If you have a vertically integrated utility and you allow it to continue to exist, it will be very slow until you get to meaningful competition. If you cutoff, and you say competition is at the top level of generation, and at the other level of that distribution transmission, you still have clear market power, and a monopoly circumstance that is likely to exist for another decade. Then there needs to be something in between those. A utility really ought to make a choice. If it wants to go into and continue its vertical integration, you are going to have to have strong affiliate rules that prevent self-dealing and abuses of market power that could exist. Even with that, you are going to still have some problems.

The problems you have now, which I think is over-regulation, would be unnecessary with structural separation, is where you have a load pocket area and you have power plants that are built for a particular group of customers, and you do not have adequate transmission so they can buy power all hours of the year from someone else, there is market power there. Whoever owns that plant has it.

Mr. WYNN. Can I jump in for a second just to clarify something? Should that be addressed by divestiture, or by transmission, adjustment of transmission assessability.

Mr. SCHMIDT. Utilities have found that divestiture is the cleanest, quickest way to deal with it. At most, many utilities are starting to sell off their power plants. It has been a great windfall for many too because the market price for those has been even greater than many expected.

Mr. WYNN. Exactly. Why should the Federal Government to make those decisions as opposed to the marketplace?

Mr. SCHMIDT. I am not saying the Federal Government should. I am not saying you should pass a law that says you mandate divestiture. I am saying where there are market power circumstances, and FERC makes a finding of those, FERC should, as a remedy, have the tool of ordering divestiture.

Mr. WYNN. Does FERC have the experience of making these kinds of decisions, given that we have never been involved in this kind of competitive marketplace? In other words, we are asking them to undertake something that now the FCC is grappling with, again, with mixed results. Are we opening up something that we really do not have the capability to handle?

Mr. SCHMIDT. Well, the Department of Justice clearly has the experience of doing it and does it regularly. We just negotiated a grocery store circumstance that did the same thing. We approved a merger, ordered divestiture of the plants and we maintained competition.

Mr. WYNN. So, this ought to be through Justice rather than FERC?

Mr. SCHMIDT. I think Justice can do it, but Justice does not have the expertise developed yet in the electric industry and FERC does. Now, I think as I have talked to Mr. Burr about, I think ultimately this may shift to Justice, but in the interim, FERC is the entity

trying to establish a competitive marketplace. FERC is the best place to put it first. FERC has deferred to Justice on their standards. So, I do not think you are going to get an inconsistency.

Mr. WYNN. I thank the gentleman. Mr. English.

Mr. ENGLISH. Just a point that I wanted to make, Mr. Wynn. I think there is another issue here. This is what I was concerned about a little bit earlier. We are kind of glossing over things.

It is one thing if you are talking about some group, a big power company that has generation all the way down through distribution and is worried about competition. It is something else when the consumers themselves own the distribution and the consumers themselves own the generation.

Now, if you are going to come in and apply the same laws and say, okay, you consumers cannot own your own generation, that is much like having your own backyard garden and you are growing your own tomatoes, and they say, well, you have got to sell your tomatoes in the marketplace and you have got to buy them from the grocery store. You cannot consume your own tomatoes.

If we get ourselves into this kind of dilemma, that is where I see a real concern. There has to be a freedom in this legislation for consumers to take care of their own needs without this kind of blanket approach to everyone who is involved in the generation or distribution of electric power.

Mr. WYNN. Thank you. I see my time is up. Thank you, Mr. Chairman.

Mr. BARTON. Thank you, Mr. Wynn. Your questions, I thought for a minute I was sitting down there. I had to make sure it was you and not me. That is where I used to sit about 6 years ago. So, apparently there is something about that chair.

Mr. WYNN. Your aura is still here.

Mr. BARTON. It creates a market pro-competition aura there. I am not going to ask any questions because I have talked to most of you individually. I have certainly talked to your groups collectively. I may have some questions in writing. I know Mr. Burr has a few and Mr. Sawyer has indicated they are going to have some.

We have another whole panel and we are going to start voting on the tax bill here fairly quickly. I want to commend each of you and your organizations for coming today, and for the seriousness with which you have looked at the bills that have been introduced. I hope that we have another subcommittee draft, on a bipartisan basis, that is available for you to review just as seriously in the next several weeks.

So, this panel is released. We would like the second panel to come forward now.

Let me have everyone's attention. We have a series of votes right now. Instead of trying to start, it has been suggested by the Minority that we go ahead and have a short recess so we can go vote, and you all can eat lunch and have personal convenience breaks.

So, we are going to reconvene at 2:30 p.m. I will be here at 2:30 p.m. I hope, at a minimum, the panel is here at 2:30 p.m. and anybody who wants to listen to their testimony.

So, we are in recess until 2:30 p.m.

[Brief recess]

Mr. BARTON. We want to welcome our second panel. One of our panel members had an airplane at 2 p.m. left, Ms. Darlene Kerr who was representing the PURPA Reform Group. So, her statement, as the others, are in the record in its entirety, but she will not be here to give a verbal summary of it.

[The prepared statement of Darlene Kerr follows:]

PREPARED STATEMENT OF DARLENE D. KERR, EXECUTIVE VICE PRESIDENT AND CHIEF OPERATING OFFICER, NIAGARA MOHAWK POWER CORPORATION ON BEHALF OF THE PURPA REFORM GROUP

#### *I. Introduction*

Mr. Chairman and Members of the Subcommittee, I am Darlene Kerr, Executive Vice President and Chief Operating Officer of Niagara Mohawk Power Corporation. I am here today testifying on behalf of my company, and the PURPA Reform Group. The PURPA Reform Group, an ad hoc coalition of utilities<sup>1</sup> concerned about the Public Utility Regulatory Policies Act of 1978 ("PURPA"), was established in 1995 to encourage Congressional and FERC reform of this statute. I very much appreciate the opportunity to testify on the legislation that has been introduced in the House of Representatives addressing PURPA.

Niagara Mohawk Power Corporation ("Niagara Mohawk"), a subsidiary of Niagara Mohawk Holdings Inc., is an investor-owned energy services company that provides electricity to more than 1.5 million customers across 24,000 square miles of upstate New York. In addition, Niagara Mohawk delivers natural gas to more than 500,000 customers across 4,500 square miles of eastern, central and northern New York.

Niagara Mohawk also is in the unfortunate position of being one of the most PURPA burdened utilities in the country. Our above-market PURPA costs have been estimated at almost six *billion* dollars, or about three-quarters of our total above market costs. While we have acted to limit the impact of PURPA costs by buying out and restructuring contracts where possible, Niagara Mohawk and its customers will bear the burden of above-market PURPA costs for years to come. I hope this puts into perspective our interest in this issue.

On many electric industry restructuring issues, a legislative consensus unfortunately still seems to be elusive, despite some 4 years of debate in this body. With respect to PURPA, however, I believe that a consensus does exist between all major stakeholders, and that consensus is reflected in several of the bills that have been introduced in this Congress and referred to this Committee. In particular, H.R. 1138, the "Ratepayer Relief Act," introduced by Congressman Stearns and cosponsored by 22 other Members, H.R. 667, "The Power Bill," introduced by Mr. Burr, H.R. 1587, "Electric Energy Empowerment Act of 1999," also by Mr. Stearns, and H.R. 2050, the "Electric Consumers' Power to Choose Act," by Mr. Largent and Mr. Markey, satisfactorily address the unfortunate legacy of PURPA. H.R. 1828, the Administration's bill, does not.

H.R. 1138, H.R. 667, H.R. 1587 and H.R. 2050 all do three things with respect to PURPA. They each:

- (1) prospectively repeal the PURPA Section 210 power purchase obligation;
- (2) protect existing contracts; and
- (3) deal with the legacy of above market costs by directing the FERC, which has jurisdiction over these federally-mandated contracts, to ensure that costs are recovered.

The Administration's bill would prospectively repeal PURPA and protect existing contracts but is silent on what happens to federally-mandated PURPA costs. For this reason, the Administration's bill is unsatisfactory and falls outside of the mainstream consensus which I believe exists on this issue.

The approach represented by H.R. 1138, H.R. 667, H.R. 1587 and H.R. 2050 represents a reasonable compromise of the three major issues (prospective repeal, protection of existing contracts, recovery of costs) presented by PURPA. More importantly, it is legally the right thing to do and represents good public policy. The eminent reasonableness of this compromise is clear from the support that this approach has received from the Electric Power Supply Association ("EPSA"), the major trade association representing PURPA project developers, the United States Chamber of

<sup>1</sup> Members of the PURPA Reform Group include: Central Maine Power Company; Niagara Mohawk Power Corporation; GPU, Inc.; Duke Power Company; Edison Electric Institute; New York State Electric & Gas Corporation; Sempra Energy; Florida Power Corp.; and Puget Sound Energy.

Commerce, Members of Congress, and PURPA-burdened utilities. I strongly urge you to include the text of H.R. 1138, the Stearns bill, as the PURPA module of the comprehensive legislation that you hopefully will develop over the next several weeks.

## II. The Legacy of PURPA

There is no longer any real debate over whether to repeal PURPA. All bills addressing PURPA prospectively repeal the Section 210 mandatory purchase obligation. The only two remaining issues are whether to protect existing contracts, and if so, who has responsibility to address cost consequences of protecting them. Nevertheless, I think it useful to highlight the history of PURPA to illustrate how we got to where we are.

PURPA was enacted as one of the original components of the Carter Energy Plan to alleviate the oil and natural gas shortages of the late 1970s. The intent of PURPA was to encourage conservation and promote the development of renewable fuels. It did this by establishing a special class of power generators, known as qualifying facilities ("QFs"), and it required utilities to buy all electricity that these qualifying facilities wished to sell. In general, a QF must be of a certain size, burn certain renewable or waste fuels, or produce steam for commercial or industrial use as well as electricity.

PURPA mandatory purchase obligations generally are long-term, 25-30 years in most cases, and often have price escalator clauses built into them. Pursuant to regulations adopted by the FERC, PURPA project developers have the option of "locking-in" administratively-forecasted prices for the entire duration of the contract, or allowing prices to be reset periodically. Not surprisingly, most project developers have chosen to lock-in prices for the duration of the purchase obligations. And, unlike utility investments, PURPA preempts the states from adjusting, modifying the terms, or engaging in utility-type rate regulation of these obligations once they are imposed.<sup>2</sup>

PURPA was not intended to lead to costs above those available elsewhere, but that has been the result. A 1996 study by the Utility Data Institute found that while the average cost of wholesale power was 2.85 cents/kwh, power purchased under federally-mandated contracts with PURPA generators averaged 6.64 cents/kwh, or over twice as much. Nationwide, electric utilities and their customers are paying \$7.8 billion a year in above-market prices to PURPA developers.<sup>3</sup> PURPA contracts are one of the largest components of utility above-market costs—some \$42 billion in net present value terms.<sup>4</sup> While PURPA contracts account for just 7 percent of all electricity sold into the grid, these contracts represent nearly 30 percent of the total above-market cost for investor-owned utilities, publicly-owned utilities and co-ops. Unfortunately, over 60% of PURPA contracts do not expire until after the year 2010.<sup>5</sup>

Besides the high cost of PURPA power, PURPA is inconsistent with wholesale competition that has been a reality since 1992 and with retail competition that is a reality for utilities serving over half the population in the country. Electricity generators and wholesale customers today have access to each other under the same terms and conditions applicable to the utility owning the transmission wires. Retail customers in some 23 states have, or soon will have, open access to the suppliers of their choice. This open access has sharply increased competition for sales of electricity, but it also has resulted in a substantial competitive disadvantage for utilities which have been federally mandated to purchase power from PURPA qualifying facilities.

As a consequence of the changes that are sweeping through the industry, many utilities, including Niagara Mohawk, have decided that they no longer will be in the generation or electricity supply business and are selling their generation assets. Unfortunately, they are still obligated to buy power from QFs, whether they need it or not. This makes no sense. Thus, continuing PURPA impedes the transition to a competitive retail market. On this, there can be no debate.

## III. Dealing With PURPA is a Federal Responsibility, Not a State Issue

I often hear the argument that Congress should leave the issue of PURPA costs up to the States. With all due respect to those making this argument, this ignores

<sup>2</sup>See, e.g., *Freehold Cogen. Assocs. v. Bd. of Regulatory Comm'rs of New Jersey*, 44 F. 3d 1178 (3rd Cir. 1995), cert. denied, 516 U.S. 815 (1995); *Smith Cogen. Mgmt. v. Corporation Comm'n*, 863 P.2d 1227 (Okla. 1993).

<sup>3</sup>Utility Data Institute, *Measuring the Competition: Operating Cost Profiles for U.S. Investor-Owned Utilities* 1995 (1996).

<sup>4</sup>Resource Data International, *Power Markets in the U.S.* 1996 (1997).

<sup>5</sup>*Id.*

the law, sound public policy, and is tantamount to urging the Congress to leave the scene of an accident it caused. If the States had jurisdiction over PURPA contracts, I am confident that they would be able to satisfactorily address the problems we now face with over-market PURPA contracts by requiring the renegotiation or termination of these contracts. There would be no above market costs if this were the case. Unfortunately, the States do not have jurisdiction and cannot force renegotiation. Past efforts to give states jurisdiction over these contracts have been met with strong opposition from PURPA project developers, fuel suppliers and financiers. There is no reason to believe that the situation will be different today.

Sales from QFs to utilities are wholesale sales of electricity (QFs are not authorized to sell at retail). Since passage of the 1935 Federal Power Act, wholesale sales of electricity are *exclusively* subject to FERC jurisdiction. While PURPA established a role for the States in exercising authority delegated to them by FERC, the fundamental Federal Power Act allocation of jurisdiction was not disturbed. The FERC retains jurisdiction over PURPA contracts. Indeed, Section 210(e) of PURPA authorizes the Commission to promulgate regulations under which QFs are exempt from "State laws and regulations respecting the rates, or respecting the financial or organization regulations of electric utilities . . . if the Commission determines such exemption is necessary to encourage cogeneration and small power production." The Commission has promulgated such regulations, and the courts have uniformly held that the FERC has preempted the states from regulating or modifying the rates, terms or conditions of PURPA contracts.<sup>6</sup>

Under the Supremacy Clause of the United States Constitution, State law that conflicts with federal law must give way. This supremacy extends not only to federal statutes themselves but also to the actions of a federal agency acting within the scope of its congressionally delegated authority. With respect to PURPA, FERC's implementing regulations requires that the rates for purchases from QFs shall be at the utility's avoided cost rate<sup>7</sup> and that such rates shall be "just and reasonable to the electric consumers of the electric utility and in the public interest."<sup>8</sup> Thus, as a matter of law, FERC has found QF rates to be "just and reasonable and in the public interest" if they equal a utility's avoided costs and it has *required* purchasing utilities to pay QFs this avoided cost rate. Any effort by a state to reduce a rate deemed just and reasonable by FERC, by restricting a utility's ability to recover these costs and thus "trapping" them, would conflict with FERC's just and reasonable rate determination. Therefore, such state action cannot stand. To do otherwise would allow states to undermine FERC's jurisdiction over wholesale transactions.

In *Nantahala Power & Light Co. v. Thornburg*, the Supreme Court reversed a decision by the North Carolina Utilities Commission which had allocated purchased power between two owners of hydroelectric powerplants in a way that differed from the allocation of power ordered by FERC. In rejecting the position of the State of North Carolina, the Court determined that the states must allow recovery of FERC-approved wholesale rates.

[A] state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price . . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.<sup>9</sup>

When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate . . . Such a "trapping" of costs is prohibited.<sup>10</sup>

PURPA itself has been found to have preempted the States from denying the passthrough of federally-mandated PURPA costs. In the leading decision supporting this conclusion, *Freehold Cogeneration Assocs. v. Board of Regulatory Commissioners of New Jersey*, the U.S. Court of Appeals for the Third Circuit ruled that a State could not modify a long-term contract between a QF and an electric utility or *deny the passage of those rates to consumers* because the State was preempted by PURPA.

<sup>6</sup> See, e.g., *Independent Energy Producers Ass'n. v. California Pub. Util. Comm'n*, 36 F.3d 848 (9th Cir. 1994); *Smith Cogen. Mgmt. v. Corporation Comm'n*, 863 P.2d 1227 (Okla. 1993); *Freehold Cogen. Assocs. v. Bd. of Regulatory Comm'rs of New Jersey*, 44 F.3d 1178 (3rd Cir. 1995), cert. denied, 516 U.S. 815 (1995).

<sup>7</sup> 18 C.F.R. § 292.304(b)(4) (1997).

<sup>8</sup> 18 C.F.R. § 292.304(a)(2) and 292.304(b)(2) (1997).

<sup>9</sup> *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965-66 (1986).

<sup>10</sup> *Id.* at 970; see also *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

The court stated that “[a] state law may not only be preempted expressly by Congress, but whenever it conflicts with federal law.”<sup>11</sup> The court further held that “[u]nder the Supremacy Clause of the United States Constitution, a federal agency acting within the scope of its congressionally delegated authority has the power to preempt state regulation and render unenforceable state or local laws which are otherwise not inconsistent with federal law.”<sup>12</sup> The court concluded that “[b]ased on the overall scheme of PURPA... we hold that Congress intended to exempt qualified cogenerators from state and federal utility rate regulations”<sup>13</sup> and that “once the [state commission] approved the power purchase agreement between Freehold and [the utility] on the ground that the rates were consistent with avoided cost, just, reasonably, and prudentially incurred, any action or order by the [state commission] to reconsider its approval or to deny the passage of those rates to [the utility’s customers] under purported state authority was preempted by federal law.”<sup>14</sup>

All States that have restructured their electric industries have allowed the continued recovery of federally-mandated PURPA costs. At least three, New Jersey, Massachusetts and New Hampshire, explicitly have found that they have been preempted by federal law from denying recovery.<sup>15</sup>

In summary, we believe that the law is clear that the States have been preempted by the Federal Power Act and PURPA from denying recovery of federally-mandated PURPA costs. However, there are still creative legal and regulatory challenges to this view, and these challenges create uncertainty, especially given the long duration of most PURPA contracts.<sup>16</sup> This uncertainty raises the cost of capital to QFs and utilities. In the case of utilities, these increased costs are reflected in higher customer rates. Congressional clarification of the FERC’s obligation to ensure recovery of federally-mandated PURPA costs is necessary to finally put this issue behind us.

#### IV. Why Assurance of Cost Recovery is the Right Public Policy

In the competitive electricity markets now emerging across the nation, many utilities cannot recover in their electric rates all the costs they previously incurred to meet government mandates such as PURPA and to provide electric service to consumers. Some have argued that this is just “too bad,” and that utilities should bear the burden of “bad business decisions.” With respect to PURPA, however, there were no “bad business decisions” (unless one considers complying with a federal law a “bad business decision”) only legislative and regulatory judgments that were misguided in many respects. Moreover, unlike investments in generating facilities, utilities are not permitted to earn a rate of return (i.e., profit) on their PURPA mandatory purchases. So utility shareholders never have been compensated for the risk associated with non-recovery of PURPA costs. Thus, to deny utilities recovery of PURPA costs represents bad public policy and is unfair to utility shareholders.

There is another very practical reason for Congressional clarification of utilities’ continuing right to recovery of federally-mandated PURPA costs. In the words of the Electric Power Supply Association:

[B]ecause these purchases fulfilled a public service obligation, it is reasonable for the utilities to recover the costs. To deny the utilities an opportunity to recover the costs would signal that contracts entered into reasonably, and often under a legal mandate, can be ignored. Abrogation of contracts will create a serious disincentive to newcomers considering whether to enter competitive markets which will be built extensively upon contracts.

\* \* \*

Today’s contracts must be honored to ensure that tomorrow’s contracts can provide the confidence needed for a robust market.<sup>17</sup>

Protection of existing PURPA contracts brings with it a corollary federal obligation to address the costs of these contracts. It would be irresponsible for Congress

<sup>11</sup> *Freehold Cogen. Assocs. v. Bd. of Regulatory Comm’rs of New Jersey*, 44 F. 3d 1178, 1190 (3rd Cir. 1995), cert. denied, 516 U.S. 815 (1995).

<sup>12</sup> *Id.* at 1190.

<sup>13</sup> *Id.* at 1192.

<sup>14</sup> *Id.* at 1194 (emphasis added).

<sup>15</sup> *Re: Electric Industry Restructuring*, Docket D.P.U. 96-00, at 273-80 (Mass. D.P.U. 1996); *Restructuring the Electric Power Industry in New Jersey*, Docket No. EX94120585y, at 112-15 (N.J.B.P.U., April 30, 1997); *Re Restructuring New Hampshire’s Electric Utility Industry*, 175 Pub. Util. Rep. 4th 193, 239-40 (N.H.P.U.C. 1997).

<sup>16</sup> See, e.g., *In the Matter of the Petition of Atlantic City Electric Company for a Final Increase in its Energy Adjustment Charge*, 708 A.2d 775 (1998).

<sup>17</sup> Electric Power Supply Association, “Retail Electric Competition: Getting it Right!” 23-24, 35-36 (January, 1999).

to protect existing federally-mandated contracts while remaining silent on the consequences of that protection. On the other hand, if the Congress were to transfer jurisdiction over PURPA from the FERC to the states, and thus not protect existing PURPA contracts, the result undoubtedly would be years of litigation and uncertainty. Neither of these options represents sound public policy.

To help ensure the continued development of competitive electric markets, Congress should clarify of the right to recovery federally-mandated PURPA costs.

#### *V. Conclusion*

Failure to face up to the federal government's responsibility for PURPA costs will only slow the transition to greater competition in the electric industry by increasing utility and project risks, and guaranteeing years of counterproductive litigation. Congress can strike a blow for a speedier transition to a more competitive electric market, while respecting past government commitments, by repealing PURPA prospectively, protecting existing contracts, and ensuring that PURPA costs can be recovered by those utilities that were forced to enter into PURPA contracts. Fortunately, I believe that a consensus exists to do just that, and this consensus is reflected in a number of bills before you.

Mr. BARTON. We are going to hear from Mr. Dick Brooks who is the Chairman and CEO of Central and Southwest Corporation. He is representing the Repeal PUHCA Now Coalition; Mr. Mark Crisson who is the Chief Executive Officer of Tacoma Public Utilities. He represents the Large Public Power Council; Mr. James Parkel, who is a member and on the Board of Directors of the American Association of Retired Persons. We are glad to have Mr. Parkel.

Ms. Maria Zannes who is the President of Integrated Waste Services Association; Mr. Marty Kanner who is the Coalition Coordinator for Consumers For Fair Competition. We welcome each of you. We are going to start with Mr. Brooks. Your statements are in the record. We are going to give you 5 minutes to summarize it and go right on down the line.

#### **STATEMENTS OF E.R. "DICK" BROOKS, CHAIRMAN AND CEO, CENTRAL AND SOUTHWEST CORPORATION; MARK CRISSON, CHIEF EXECUTIVE OFFICER, TACOMA PUBLIC UTILITIES; JAMES G. PARKEL, MEMBER, BOARD OF DIRECTORS, AARP; MARIA ZANNES, PRESIDENT, INTEGRATED WASTE SERVICES ASSOCIATION; AND MARTY KANNER, COALITION COORDINATOR, CONSUMERS FOR FAIR COMPETITION**

Mr. BROOKS. Thank you, Mr. Chairman.

I am Dick Brooks with Central and Southwest, Chairman and CEO. I am here today to represent the Coalition Repeal PUHCA Now. I do commend the chairman and the committee members for all of the effort you have put forth on this bill and certainly on PUHCA repeal. I would today like to express the views of the coalition.

The coalition is only focusing on PUHCA repeal. So, I will keep my remarks to that and provisions pertaining to same. Mr. Chairman, the coalition supports the passage of H.R. 2363, the Public Utility Holding Company Act of 1999. It is a bipartisan bill introduced by Congressman Tauzin and Congressman Towns.

This bill has been carefully developed, and crafted, and negotiated, and compromised over the last several Congresses. It has gotten the point that I think it is a culmination of the efforts over the last several sessions. In our opinion, it is certainly ripe for consideration and passage at this time.



Since the Securities and Exchange Commission actually recommended repeal of this act in 1995, we think it has been a question of not whether it is going to be repealed, but when it is going to be repealed. In the 1980's a Republican Administration recommended to a Democratic Congress that we repeal PUHCA.

In the 1990's, a Democratic Administration recommended to a Republican Congress that we repeal PUHCA. Underscoring this support, repeal language was included in the legislation introduced this session, both by Republicans, Democrats, and by the Administration.

Repeal provisions in the Tauzin-Towns bill provide replacement of the 1935 act with a modernized Public Utilities Holding Company Act that guarantees that FERC and the States will have access to books and records of the companies, of their affiliates, and of all transactions occurring among the same.

It continues all FERC and State authority to regulate these companies like they do today on whatever basis they feel is proper. It grants FERC the power to decide who should be exempted under the act. We support similar provisions under the Burr bill and under the Bliley-Dingell bills.

The difference there is that there is an 18-month time period between enactment of the bill and its effective date, as compared to the Tauzin-Towns bill, which is 12 months. We support either and both of those. We like the repeal provisions in the Stearns bill, quite frankly.

As a matter of fact, it may be a little bit more favorable to us than others. The language there does not really reflect the concessions that have been given up to represent consumer protection over the last several sessions of Congress; so, that and other amendments put on by the Senate during the last several sessions.

So, we do like the Stearns bill, but the language is maybe not quite as conservative as it is in the bills we are talking about. The Tauzin-Towns bill has undergone very rigorous scrutiny by the policymakers. That is why we say it is ripe for passage at this session.

I will say that the coalition strongly opposes language, any language that would tie PUHCA repeal to retail access in the States. The repeal language in the Largent-Markey bill, and any proposal that would create a new exemption for the companies which offer retail access, we strongly oppose.

Mr. Chairman and members, let me say this. If we do not repeal PUHCA and we continue to delay that, and let this onerous act continue to be applicable, first off, it will continue to hamper competition in the States that currently offer choice or are planning to offer choice on a date-certain.

Second, it encourages market power. One of the best ways to start solving market power is to eliminate the act. As a matter of fact we, as holding companies, can only expand or purchase assets next door. It also limits people from foreign States from coming in and being additional providers of generation.

It currently limits investment in growth opportunities in other industries. It limits us from providing additional services to customers we already serve. It would continue to favor foreign investors coming in and buying into our utility systems as compared to our being able to do that. It limits us to be able to invest in foreign

opportunities compared to those companies who are not jurisdictional.

Mr. BARTON. You need to summarize, Mr. Brooks. I hate you rush you. You have waited a long time, but we have four other people. We probably do not even have about 30 or 35 minutes before we have to go vote again.

Mr. BROOKS. Yes, sir, I will. I will say this last point. If conditional repeal is to get us to influence the retail choice in the States, please reconsider because we have about as much influence in the States as we have had in Congress in getting PUHCA repealed.

So, with that, Mr. Chairman, thank you for allowing me to be here. I will be glad to answer questions at a later time.

[The prepared statement of E.R. "Dick" Brooks follows:]

PREPARED STATEMENT OF E.R. "DICK" BROOKS, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, CENTRAL AND SOUTH WEST CORPORATION ON BEHALF OF THE REPEAL PUHCA NOW! COALITION

Mr. Chairman and Members of the Committee: The Repeal PUHCA Now! Coalition (the Coalition) is pleased to submit this testimony to address the various proposals providing for the repeal of the Public Utility Holding Company Act of 1935 (PUHCA) pending before the 106th Congress. The Coalition includes registered and exempt electric and gas utility holding companies restricted under PUHCA. We have supported enactment of PUHCA repeal legislation as recommended in 1995 by the Securities and Exchange Commission in a report to Congress. The Coalition believes it is essential that PUHCA repeal legislation be enacted into law this year and is pleased that most restructuring bills introduced this year contain some form of PUHCA repeal. Simply put, repealing PUHCA is a pro-competitive step, and eliminates a barrier to competition, a barrier to state restructuring efforts, and a barrier to consumer benefits.

The Coalition commends the Committee for conducting a hearing at which the need and urgency for PUHCA repeal may be made again this Congress. The Coalition respectfully believes that all of the issues on restructuring the electric industry discussed at today's hearing need not be linked in order to establish and justify the need to repeal PUHCA now. As discussed below, the Coalition believes that PUHCA repeal must be considered independently, on its own merits. Keeping the 64-year old statute in place frustrates competition, is a barrier to entry, and actually promotes industry concentration. The industry and its regulators understand this and the Coalition hopes to convince the Congress that the case for repealing PUHCA now is overwhelming. Since the Coalition is united only on the need to repeal PUHCA, these comments will be limited to the PUHCA provisions contained in the several bills introduced thus far this Congress.

The Coalition supports legislation that repeals PUHCA and replaces it with a streamlined regime that provides for adequate measures to provide consumer protections as a stand-alone measure. We support Congressmen Tauzin (R-LA) and Towns (D-NY), and their cosponsors in their bipartisan effort to enact H.R. 2363, the "Public Utility Holding Company Act of 1999," to ensure that another Congress does not conclude without considering PUHCA repeal.

Some background is necessary to understand the genesis and evolution of the provisions of H.R. 2363. This bill's provisions arose out of the SEC's 1994-1995 yearlong study on PUHCA's continued relevance in today's evolving electric and gas markets and sophisticated utility oversight. The SEC study began in July, 1994, with a round-table hearing at which consumer groups, rating agencies, State and Federal regulators, industry representatives all analyzed PUHCA's effectiveness and continued with an invitation for all interested parties to submit comments on all aspects of PUHCA, pro and con. The SEC received thousands of pages of comments, with only one out of over 110 participants suggesting that PUHCA should not be repealed or modernized. All other interested parties agreed that PUHCA needed significant revisions. And today, no knowledgeable party that understands the role of PUHCA disagrees that PUHCA should not be significantly modernized. Those that argue for delay or for the continuation of PUHCA do so for either unsubstantiated reasons or for political expediency ignoring the overwhelming case made for repeal by the objective experts.

Following the SEC's 1995 report to Congress, a bipartisan bill was drafted incorporating the consumer protection provisions the SEC recommended. This bill was

introduced in the 104th Congress. (S. 1317 by Senators D'Amato (R-NY) and Sarbanes (D-MD), et al.). S. 1317 passed the Senate Banking Committee and was awaiting final consideration by the full Senate before that Congress adjourned. A companion bill (H.R. 3601 by Congressman Tauzin, et al.) was introduced in the House but was not reported out of committee, notwithstanding several vigorous and extensive hearings before the House Commerce subcommittees on the SEC's report and proposed legislation.

In the 105th Congress, a similar unconditional PUHCA repeal bill was introduced in the Senate. (S. 621 by Senators D'Amato, et al.). In this Congress, the bill was amended in the Senate to provide additional consumer protections but, again, Congress adjourned prior to action by the full Senate. A companion bill to this amended Senate bill (H.R. 3976 by Congressman Tauzin, et al.) was introduced in the House. And again, notwithstanding additional committee hearings on the need to repeal PUHCA, no action was taken by this Committee.

The provisions of H.R. 2363 are identical to the PUHCA repeal bills reviewed by this Committee and reported, as amended, by the Senate Banking Committee last Congress. Thus, H.R. 2363 reflects several years of negotiations and collaboration between the FERC, the SEC, NARUC, Congressional staff, as well as various industry stakeholders. It represents a carefully developed and negotiated compromise and one ripe for Congressional action. It provides for PUHCA to be repealed 12 months after date of enactment. It provides for sufficient consumer protection provisions in a regulated, yet evolving restructured market. This bill grants FERC in wholesale rate proceedings, and the State commissions in retail rate proceedings, access to the necessary books and records of holding companies and their associate companies when such are relevant to reviewing costs proposed to be recovered by regulated public utilities in their jurisdictional rates. The bill also authorizes FERC to review affiliate transactions between regulated and non-regulated associate companies within holding company systems. FERC is empowered to determine which utilities will be exempt under the new PUHCA, including those currently exempt from PUHCA of 1935 and those currently free from FERC jurisdiction.

H.R. 2363 also ensures the continuance of all existing authority FERC and the states currently have in reviewing affiliate transactions. Additionally, the bill continues all existing authority FERC and the States currently have under the Federal Power Act and all applicable State law, respectively, to protect consumers.

In the event that Congress is unwilling to repeal PUHCA as a stand-alone bill this year, the Coalition supports legislative language that has similar provisions to H.R. 2363, and, as discussed below, several of the bills already introduced this Congress has these provisions.

The Coalition strongly opposes, however, any language that conditionally repeals PUHCA. As discussed more fully below, there exists no substantive reason why PUHCA repeal should be tied to retail competition.

PUHCA repeal provisions similar to H.R. 2363 have been reproduced in four bills introduced in this Session of Congress. Although essentially the same, each are different and will be discussed in greater detail.

H.R. 667, "The Power Bill," introduced by Congressman Burr (R-NC), contains language identical to the stand-alone bill introduced by Congressman Tauzin in the 105th Congress (H.R. 3976). It does not condition the repeal of PUHCA of 1935 recognizing that PUHCA stands in the way of effective competition within the several States. It requires the keeping of certain books and records by holding companies and their subsidiary companies and provides FERC and the States access to such records if deemed relevant to disallow any cost recovery in a rate proceeding. Like the H.R. 2363, it authorizes FERC to exempt companies from these requirements. However, unlike H.R. 2363 that provides for a 12-month effective period from date of enactment, the Burr bill provides for an 18-month effective period. Thus, it is identical to S. 313 that has been reported out of the Senate Banking Committee and is awaiting final action by the full Senate in the 106th Congress.

H.R. 1587, the "Electric Energy Empowerment Act of 1999," introduced by Congressman Stearns (R-FL), contains language similar to the unconditional repeal PUHCA legislation introduced in the 104th Congress prior to the original Senate Bill being amended. But for relatively minor differences in the stated purpose of the repeal section, its provisions are identical to H.R. 3601 by Congressman Tauzin, et al., and S. 1317 by Senator D'Amato, et al., of the 104th Congress. While the Coalition does not object to these provisions of H.R. 1587, it should be noted that the provisions of H.R. 667, H.R. 1828 and H.R. 2363 contain amendments adopted by the U.S. Senate and incorporated in subsequent PUHCA repeal bills since the 104th Congress. (See H.R. 3976 by Congressman Tauzin, et al., and S. 621 by Senator D'Amato, et al., of the 105th Congress). These amendments clarified certain defini-

tions and provided for certain exemption authority by the FERC. Like Tauzin's H.R. 2363, the Stearns bill's provisions become effective one year from date of enactment.

H.R. 1828, the "Comprehensive Electricity Competition Act," introduced by Congressmen Bliley (R-VA) and Dingell (D-MI), contains repeal provisions virtually identical to the Tauzin and Burr bills. Like the Burr bill, Bliley's bill repeals PUHCA 18 months after the date of enactment. With this effective date, these provisions are identical to those of S. 313 awaiting final consideration by the full Senate.

H.R. 2050, the "Electric Consumers' Power To Choose Act of 1999," introduced by Congressmen Largent (R-OK) and Markey (D-MA), contains PUHCA repeal provisions similar to those of H.R. 2363 but differs in one major way. PUHCA of 1935 is not unconditionally repealed as in H.R. 2363 but rather only if all but one of the states within the service territory of public utilities of a holding company system provides for retail electric or gas access. If two or more states within the service territory of a registered holding company system have not provided for retail access, PUHCA's onerous restrictions continue to apply.

The Coalition strongly opposes this provision. This exemption scheme effectively is a back-door mandate on the states regarding retail access. This approach is at odds with the consensus that now exists on the Committee that Congress should not mandate retail access on the states. Thus, Congress should not enact any legislation that ties PUHCA repeal to whether the states order retail access in their respective states.

H.R. 2050 also differs from H.R. 2363 in two less significant ways. First, the provisions are effective 18 months from date of enactment. Second, an "exempt telecommunications company" (ETC) authorized in the Federal Telecommunications Act of 1996 is added to the list of those entities exempted from the PUHCA provisions. The Coalition prefers a 12-month effective date since sufficient time has elapsed for states to address any perceived regulatory gaps since the 1995 SEC report recommending repeal but has supported bills with an 18-month effective date. The Coalition does not object to the exemption of ETCs.

As described more fully under our attempt to debunk the several myths surrounding PUHCA's repeal, PUHCA repeal should not be held up for full-fledged competition. The current restrictions under the Act are preventing the affected companies from offering many services now that would benefit consumers. There cannot be effective competition if the electric and gas utility segment of the competitive market continues to be hampered by the Act.

There also has been one proposal suggesting that another class of exemptions be created under PUHCA rather than repealing the Act. Current holding companies registered under PUHCA would be permitted to become exempt from PUHCA's restrictions if each of the public utilities of a holding company's system unilaterally offers retail choice to its customers even if their respective States have not mandated retail choice.

There are several problems with this approach. First, all experts agree that PUHCA should be repealed now, because it unnecessarily prevents companies from becoming competitive, is not necessary as part of today's regulatory regime even without retail competition, and because it has accomplished its goals. An exemption would continue an unnecessary, burdensome regime for which no purpose exists for its continuance.

Second, many exempt companies today support PUHCA repeal because it limits their flexibility and efficiencies both structurally and financially. Adding another exemption simply increases the burdens on all exempt companies. Rather than removing obstacles to competition and efficiencies, Congress is perpetuating them.

Third, such a provision is punitive to companies operating in the several States that have decided for local reasons not to offer retail choice to its citizens at this time. It is unclear how companies can offer such choice to its customers they are obligated to serve in such states. PUHCA companies are faced with a clear dilemma: If a State commission does not believe allowing a company the ability to offer choice, the only real option left is the sale of the company to an entity that is not subject to PUHCA. What are the public policy goals of such a proposal?

The Coalition thanks the Subcommittee on Energy and Power for this opportunity to comment on the various PUHCA repeal proposals introduced this Congress. We strongly believe that the case to repeal PUHCA had been made during this Congress and the past two. The only question was when was Congress going to repeal PUHCA, not if. However, with the recent proposals to tie PUHCA relief to customer choice, we feel it necessary once again to make the case for repeal—even without customer choice. Therefore, to reiterate the sound public policy reasons supporting PUHCA repeal, the Coalition submits, once again, the case for PUHCA repeal.

## THE CASE FOR PUHCA REPEAL

## I. INTRODUCTION

As everyone here knows, the electric utility industry is changing rapidly. Twenty-four states have now enacted laws or regulations restructuring retail electric markets affecting 58% of the U.S. population. Other states are considering similar measures. As electricity markets become more and more competitive, the strictures and limitations of PUHCA are not compatible with the current state of the industry. PUHCA is outdated, duplicative and no longer serves the interests of consumers or investors. PUHCA has become a regulatory anachronism, a barrier to competition and innovation. It imposes unneeded restrictions, significant costs, and confers no real benefit. The time to act to repeal PUHCA is now and the Repeal PUHCA Now! Coalition urges the Congress to pass PUHCA repeal legislation as soon as it can reasonably be done.

PUHCA repeal should not be held hostage to the important debate about the potential further restructuring of the electric industry, or whether comprehensive federal electricity legislation is needed to benefit all consumers nationwide. From state to state and here in Washington, the members of the Repeal PUHCA Now! Coalition have been very active in this debate. But the Congress must realize that electric utility restructuring issues impact all stakeholders in the electric utility industry, not just the eighteen (18) active registered holding companies and one hundred fifty-one (151) exempt electric holding companies. These electric utility restructuring issues deserve serious study, discussion and debate. This discussion and debate is well underway in the Congress. Already this Congress, there are no less than seven bills currently pending in the Congress that would in some respect restructure the electric utility industry, and other bills, including the Administration's, are expected to be introduced soon. As this reflects, the issues are as contentious as they are complex. As a result, no meaningful consensus has emerged on whether, or even if, Congress should enact comprehensive electricity legislation. A truly durable consensus will not develop overnight. Thus, the Repeal PUHCA Now! Coalition strongly urges that the debate on future electric policy move forward separately from consideration of PUHCA repeal legislation.

Keep in mind, Mr. Chairman, that serious debate and discussion of these global electric policy issues has only developed in the last two Congresses. Conversely, a full merits review of PUHCA repeal started over seventeen years ago. In 1982, during a Republican Administration, the SEC found that PUHCA's statutory objective had been achieved and recommended PUHCA repeal to a Congress composed of a Republican Senate and a Democratic House. In the intervening seventeen years, the case has been overwhelmingly built to show that conclusion was correct. In 1995, during a Democratic Administration, after conducting another full study of PUHCA's relevance, including significant public participation, the SEC again concluded that PUHCA was no longer needed and that, with appropriate consumer protection provisions to assure effective regulation of utilities, repeal was the preferred option.

The Repeal PUHCA Now! Coalition agrees. The SEC's 1995 supporting analysis is clear and irrefutable. Indeed, it has now been over twenty-five years that the agency accomplished the goals Congress set for it when the PUHCA was passed in 1935. We agree with the SEC that leaving PUHCA in place burdens the industry and the agency, and does so at a cost to society that far exceeds any potential benefits.

Repealing PUHCA is important not just to the companies that for over 64 years have borne the burden of its regulatory requirements, and whose ability to respond to *existing* competition is handicapped by that Act, but to other utilities—gas and electric—as well. On this issue, gas and electric registered holding companies are united: we all need the ability to respond more freely and flexibly to market opportunities emerging daily as the States restructure retail electric markets and respond to vigorous competition in the wholesale markets.

Similarly, companies now exempt from the Act's requirements again both gas and electric—also seek repeal. The potential application to them of the Act's full strictures, and the current imposition of limits on their ability to serve customers geographically or through additional utility services, hinders innovation and frustrates an exempt holding company's ability to compete in wholesale and retail markets.

While the future structure of the electric industry remains open to debate, there is a much clearer picture with respect to the natural gas industry. The gas industry has already experienced significant and historic regulatory and competitive changes. All the gas registered companies now face competition in virtually every facet of their business. Yet they remain subject to additional regulation over their lines of

business, corporate structures and financing that their competitors do not have. PUHCA's regulations impose higher costs and less flexibility, handicapping them in meeting the demands of intensely competitive gas markets. Suffice it to say, repeal of PUHCA, with appropriate consumer safeguards, is essential in letting these gas companies compete and develop innovative products and services, while the regulatory agencies and legislatures, including Congress, consider further changes in energy policy as applied to the electric industries.

## II. THE BURDENS OF PUHCA

Registered holding companies face burdensome and limiting requirements under PUHCA. These burdens, which create severe disadvantages when compared to other industry participants, include:

- We are limited to serving utility customers in a "single integrated" utility system, which seriously restricts the geographic scope of our utility operations. As a result, we are hampered in offering services to others, even in our core business, either by significantly expanding our operations or investing in other utilities, as can be done by non-holding companies.
- We generally need prior approval from the SEC before our affiliates and subsidiaries can enter into contracts with each other. The SEC determination of the terms (including whether the contract will be at market rates or at cost) is binding on rate regulatory agencies. As a result, opportunities to save some costs or to operate with efficiencies, available on short notice, cannot always be seized.
- Our non-utility subsidiaries and we generally cannot issue or sell securities, or alter the rights and powers of security holders, without prior SEC approval. As a result, our capital structures are much more limited; and our ability to take advantage of financing opportunities, especially in dynamic capital markets, is more limited; and we cannot use several types of securities now widely accepted as appropriate throughout the rest of our industries.
- Without special SEC approval, we cannot diversify into other lines of business—under existing SEC interpretations, we are limited to the single utility business, plus only such other businesses as "reasonably incidental, or economically necessary or appropriate" to the operation of an integrated utility business. Even with some recent SEC initiatives, business opportunities that would help additional economic development in our service territories, and even businesses that if allowed to operate freely would save our customers money, may be foreclosed. In addition, where exemptions do exist, they often contain technical requirements that prevent the use of efficient business structures and often restrict or limit how registered companies can employ shareholder capital.

PUHCA places severe restrictions on registered holding company acquisitions of natural gas distribution companies. The SEC has consistently refused to view an electric system and a natural gas system as capable of constituting a "single integrated public utility system". The agency allows electric registered holding companies to "retain" a gas system only if the demanding standards of the Section 11 "ABC Clauses" are met. This requirement effectively precludes an existing electric registered holding company from acquiring even a neighboring gas system and enjoying the competitive convergence benefits enjoyed by numerous combination (electric and gas) exempt holding companies. A registered holding company could potentially satisfy the ABC clauses only if it acquired or merged with an existing combination company.

Even the exempt companies, although free of virtually all of the specific corporate restrictions in PUHCA, are limited to serving utility customers in a specific geographic area, lest they lose their exemption. They also must be concerned about diversification, because the SEC has the power to revoke their exemption under the so-called "unless and except" clause.

Although they were important at the time of the Act's passage, the stringency and severity of these restrictions make little sense today, especially as the utility industry is restructuring. In the 64 years since 1935, securities markets have become much more effective and efficient. The SEC's other authorities under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939 assure that investors receive appropriate information and can make informed decisions. Moreover, there is extensive financial and corporate information available commercially through hundreds of magazines, newsletters, on-line computer services, and network sources, enabling the markets to respond within hours of significant events. Rating agencies, such as Moody's and Standard & Poor's, constantly evaluate our management, financial integrity, and operations and rate us accordingly. As a capital intensive industry dependent on the financial markets and being

sensitive to the costs of such capital, we are committed to maintaining financial flexibility through a strong capital structure and favorable securities ratings by such agencies.

Similarly, the utility regulatory commissions, both FERC and the State Commissions, have clearer authority than was in place in 1935. The standardization of utility accounting, better staffing and more clearly defined requirements have all made rate regulation more effective.

In light of the changes the electric industry is experiencing today, and expressly in light of the authority that already exists in the SEC, FERC and the State Commissions regarding the securities markets and rate matters, PUHCA has become redundant regulation. It lacks the flexibility to allow the companies to adapt to new circumstances. Its model of the utility industry simply no longer comports with the reality of what the industry is doing, and what FERC, the State legislatures and State Commissions would like us to do. We need permanent relief today from the unnecessary regulatory burdens imposed by the Act.

### III. DEBUNKING THE MYTHS ABOUT PUHCA

There is strong bipartisan support for PUHCA reform. In the last two Congresses, PUHCA repeal bills have had cosponsors from both sides of the aisle. Both Democratic and Republican Administrations, dating back to the Reagan Administration, support PUHCA repeal. While not everyone may agree on all the details of potential federal electric utility restructuring legislation, there is strong support that the time for PUHCA to be repealed or reformed is now. With this in mind, it may be helpful to address several of the last gasp arguments repeal opponents still make.

*Myth No. 1: PUHCA cannot be repealed until retail competition is established.*

As discussed above, effective retail competition can not be established unless and until PUHCA is repealed. PUHCA's requirements and restrictions unduly limit and burden virtually any utility company owning or operating any utility assets for the production, transmission, transportation or distribution of electric energy or manufactured or natural gas within the United States. As discussed more fully below, not Congress, the states, or the FERC can create a truly competitive environment with PUHCA remaining in place.

In reviewing the issues that may need to be addressed this year, Congress should keep in mind the level of activity concerning retail choice in the states and at the FERC. As you know, almost every state currently has some type of electricity restructuring proceedings underway. Twenty-four states have implemented retail competition frameworks, some on a phased-in basis.

Congress has wisely given the states and FERC significant time and latitude in picking the pace, method and means for achieving retail competition. This approach has allowed the states to proceed with retail competition tailored to their own regional circumstances. This has provided Congress and regulators critical information and experience to make informed decisions about any potential comprehensive federal legislation.

Based upon the evidence to date, the states that are restructuring are in fact moving forward without federal intervention. From California to New York, Arizona to Arkansas, Maine to Maryland, the states have passed laws or regulations to establish retail competition. Thus, the real question for the Congress to focus on is whether the sixty-four year old statute is impeding the numerous state initiatives to restructure retail electric markets. Does PUHCA help or hurt the existing and future efforts to establish state ordered retail competition?

In the Coalition's view, keeping PUHCA in place will hurt state ordered establishment of retail electric competition. Simply put, the scope of retail competition will be artificially constrained and truncated by a number of PUHCA's regulatory restrictions. Let us give you several examples.

PUHCA forbids domestic Exempt Wholesale Generators ("EWGs") from selling power at retail. As a result, many low-cost generation suppliers refrain from making retail sales because of PUHCA-related concerns. This applies to all entities—whether registered, exempt or non-holding companies. Indeed, any generation supplier wishing to avoid a holding company structure would face potential PUHCA jurisdiction if it were to setup a subsidiary and that subsidiary were to make retail sales.

Registered holding companies interested in making retail sales from facilities that are distant from their franchised retail service areas must face the geographic constraints of PUHCA's "integration" standard, which, as noted above, generally restricts registered company "utility" operations to a regional scope. This means, for example, that a registered holding company based in the Eastern U.S. would be effectively excluded from selling retail power from a facility located in California. Similarly, an exempt holding company can risk its exempt status by undertaking

non-EWG sales outside the geographic boundaries defined by Sections 3(a)(1) and 3(a)(2). Thus, for example, a utility holding a Section 3(a)(1) “intrastate” exemption cannot make substantial retail sales outside the state where the utility is incorporated and conducts most of its utility business. This does not promote economic efficiency or a robust retail generation market.

In addition, many state restructuring laws call for or are contemplating the separation of generation and transmission/distribution assets into separate corporate entities. This aspect of restructuring can cause particular problems for both registered and exempt holding companies. Think about it: can a 64-year-old piece of legislation be applied to a different utility business than was conceivably envisioned in 1935? PUHCA was not designed to be flexible. PUHCA mandates a single geographically and operational integrated structure, not well adapted to an evolving industry as a result of federal and state restructuring competition initiatives. As noted earlier, PUHCA isolates electric and gas systems to limited, discrete geographic areas. The requirement under PUHCA that registered holding companies maintain a single, integrated utility business has quickly become problematic as governmental entities and a growing competitive market pressures companies to restructure. As electric utilities are compelled by state legislation, regulation or competitive forces to either “unbundle” utility functions and assets in an effort to restructure their businesses along product lines or comply with corporate unbundling requirements, the conflicts with PUHCA are becoming acute.

PUHCA controls this “unbundling” process unnecessarily. Yet the “unbundling” already has begun as a result of the twenty state restructuring plans already enacted, the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and the Energy Policy Act of 1992 (“Policy Act”). This “unbundling” has produced significant new players with geographically widespread utility properties. Since the new players under PURPA and the Policy Act are exempt from PUHCA, how can PUHCA’s geographic integration requirements be significant and necessary to this changing industry?

There is another aspect of PUHCA’s integration requirements, which may be at odds with retail competition unbundling of functions and services. Registered holding company systems are required to operate in an integrated manner. This requirement has led to centralized electric system planning, construction, and the use of: (a) companies providing common management, financial, accounting and planning services, among other services, for all companies, utility and non-utility alike, in the same system, (b) fuel companies serving various affiliated companies and (c) companies operating power plants for various affiliated companies. In addition, for registered holding company systems and their integrated operations, it has been a prevalent practice to have common officers, and in many cases, common directors among affiliated companies. Will these integrated planning, service and personnel requirements be appropriate and workable in a disaggregated and competitive electric business where flexibility is necessary?

A number of registered holding companies have divested or are planning to divest their electric generator assets and will operate in restructured systems where their retail customer base will be open to competition. It is unclear that the integration standard will have any relevance under such circumstances.

For multistate registered holding company, PUHCA is a major concern as states move forward to competition. PUHCA restricts our ability to compete. This is attractive to our “unregulated” competitors as they move forward unimpeded. PUHCA restricts the types of business we can invest in, where we can invest and how much capital we can deploy. Restricted investments, required integration systems and financial prohibitions severely impact our structural and financial ability to respond to a rapidly moving competitive retail market. If a level playing field is sought, for a competitive market, PUHCA stands out as a significant barrier to achieving this goal.

Technology is another issue. PUHCA was adopted in a world without computers, without reliable transmission systems, without regional power pools, without reliable long-distance communication. Technology was one reason for PUHCA’s geographic integration limits. Obviously, technology has passed PUHCA, and its integration requirements by.

A prominent feature of current FERC policy and most state restructuring frameworks is the establishing of so-called Regional Transmission Organizations (“RTOs”)—whether they are an independent transmission company (“Transco”) or an Independent System Operator (or “ISO”). These RTOs typically assume in some fashion control of the regional or statewide electric transmission grid in order to assure further non-discriminatory access and efficient, reliable system operation.

PUHCA presents a potential regulatory dilemma for some RTOs, since these entities may, depending on the facts, fall under the definition of “electric utility com-



pany” under Section 2(a)(3) of PUHCA—that is, an RTO will “operate facilities used for the generation, transmission, or distribution of electric energy for sale ...” Indeed, in order to perform their mandate effectively, RTOs must necessarily exercise operational control over transmission grid facilities.

RTOs are not the kind of public utility entities that PUHCA was designed to regulate. They will not exercise market power. They raise no issues regarding ratepayer harm; rather, they will facilitate ratepayer interests by promoting regional electricity markets. Yet because RTOs could, under certain circumstances, be deemed to be PUHCA “electric utility companies”, any person or company which might be regarded as exerting a “controlling influence” over an RTO could in turn be deemed a “holding company” potentially subject to full PUHCA regulation. This is a very real concern. To be sure, the SEC Staff has issued a no-action letter concurring that the California ISO is not a PUHCA “electric utility company” because it is an “instrumentality” of the State of California, based on the State legislature’s restructuring directive. However, the means of RTO creation varies from region to region, and most RTOs will operate on a regional, rather than a statewide basis. The PUHCA uncertainties associated with the structure and operations of RTOs may cast a regulatory cloud over a vital aspect of state and federal restructuring efforts. It is unclear how the SEC will deal with this critical issue, especially now that most of the RTOs that have been approved to date have been and are also power pools, which have not been regarded as creating a holding company structure for member utilities. Thus, on the one hand, RTOs will be critical to successful restructuring efforts. On the other hand, PUHCA may impede RTOs from developing regionally, with broad-based membership. Is it really in the public interest to require RTOs to become registered holding companies simply to provide a function almost everyone believes will become necessary in the future?

The corporate or functional unbundling features of current restructuring programs can also be highly problematic for utilities holding a Section 3(a)(2) exemption. Section 3(a)(2) provides an exemption for holding companies that carry on the bulk of their utility activity at the parent company level, with only minor utility subsidiary operations. Thus, for example, if a parent utility company must transfer to a subsidiary company substantial generation assets to comply with state initiated restructuring law, it may no longer qualify for a Section 3(a)(2) exemption, since the bulk of its utility operations may now be conducted downstream at the subsidiary level.

In addition, restructuring mandates may effectively compel a utility to create a new holding company over generation, transmission/distribution, and non-utility subsidiaries, as a means of assuring effective corporate separation of utility functions and safeguarding against potential cross-subsidization. The creation of such a top-tier holding company with no utility assets of its own, however, precludes retention of a Section 3(a)(2) exemption (which requires that the parent holding company also be a utility company).

In sum, over the long-road PUHCA will hinder state restructuring efforts. PUHCA is an entry barrier, impeding robust retail competition. State driven restructuring presents potential problems for the ability of registered companies to comply with PUHCA’s requirements and compete in newly created retail markets. Registered companies are subject to the “integration” standard, which demands, among other things, that utility operations be component parts of a vertically integrated system. This standard clearly clashes with emerging competitive systems based on unbundled service, independent system operators, and power exchanges. And ironically, state restructuring will likely endanger certain utilities’ existing exemptions and thus require them to become registered holding companies.

Leaving PUHCA intact as state restructuring proceeds will create perverse incentives, as companies recreate “PUHCA Pretzels” especially regarding transmission assets—to comply with PUHCA’s broad reach, restructure their products and services, and to compete in retail electricity markets. This federal barrier to state enacted retail competition reforms can only be removed by the Congress. That is why PUHCA repeal legislation should be signed into law this year.

*Myth No. 2: PUHCA prevents utilities from exercising market power.*

This hearing today appears to link PUHCA with merger and market power issues. Such appearance might lead policy makers to conclude erroneously that PUHCA repeal will create market power abuses. Contrary to the myths about PUHCA preventing the exercise of market power, PUHCA actually perpetuates market concentration. Companies subject to PUHCA are confined within geographic boundaries consistent with the “integration” standard. While at one time this was considered a way of stopping growth, and enabling federal and state utility regulation to mature, it has instead led to a concentration of the utility market. This market con-

centration that occurs in a monopoly situation serves to impede competition and frustrate state restructuring programs. If PUHCA stays in place, it will only perpetuate a monopoly situation for those consumers in that service territory.

Now the Coalition realizes that some have asserted that it is essential to retain PUHCA in order to limit what they call “concentration of market power” as the electric industry restructures. Those who make that assertion either do not understand the role PUHCA has played, or willfully misstate it. As stated earlier, PUHCA is a corporate structure and securities statute. Its main goal was corporate simplification, not establishing or setting specific rates for utility services. We cannot emphasize enough that PUHCA’s existing provisions actually increase the likelihood of concentrations in particular markets, because the “integration requirements” and geographic restrictions of the Act limit both registered companies and exempt companies to retail utility holdings in particular areas, and restricts the ability of more distant companies to acquire, construct or operate facilities that could compete with the local utility. PUHCA effectively keeps new entrants out of markets, and keeps registered companies from engaging in competitive lines of business. Indeed, PUHCA as it stands requires utilities to limit acquisitions to nearby utilities—ones that can be integrated or that do not result in a loss of exempt status. Those nearby utilities are the ones most likely to have presented the possibility of competition.

PUHCA was originally enacted to prevent abuses by utility companies by restricting growth and advancements at a time when there were little or no state or federal utility regulatory controls available. While this approach served us well in 1935, it is now outdated and serves as an impediment and a barrier to a competitive market, especially at the retail level.

PUHCA was not designed as and is not a utility or rate regulation statute. PUHCA is primarily a law dealing with corporate governance and securities issues. Aside from the fact that it has outlived its usefulness because of changes in the way we regulate and review securities transactions, PUHCA might be viewed as an energy matter only from the standpoint that the companies it governs happen to be in the energy sector. Other significant laws govern regulating public utilities when they provide electricity services to consumers. These laws, most notably the Federal Power Act, the Natural Gas Act, and other state utility laws, deal with the rates consumers pay for electricity and gas services. PUHCA does not. In fact, PUHCA repeal bills in the last two Congresses, with their consumer protection provisions, actually will help public utility regulators do their ratemaking job at both the federal and state levels. To withhold PUHCA repeal from moving forward due to concerns about market concentration in a time when competition in the retail market is rapidly moving forward sends conflicting policy signals. Competition is good, unless you are a registered holding company. Over the long-term, a competitive, free market provides low prices and efficiencies for our consumers, but long-term consumers benefits will be prevented to consumers served by the 18 active registered holding companies.

*Myth No. 3: Repealing PUHCA will create a regulatory gap.*

Repealing PUHCA will not create a regulatory gap, it will eliminate one. Ever since the U.S. Supreme Court issued the *Ohio Power* decision, PUHCA’s general requirements that affiliate contracts be “at cost” have prevented FERC and state regulators from applying a market test to lower costs of services for wholesale and retail consumers in most cases. This decision has preempted FERC and perhaps the state regulators from disallowing the recovery of certain costs. With the repeal of PUHCA, this regulatory gap will be eliminated prospectively once and for all. The rate regulators, at both the wholesale and retail levels, properly will have the authority to determine the allocation and reasonableness of costs incurred by the utility in the provision of necessary services and whether or not such costs should be recovered in rates. Currently PUHCA hinders such rate regulation.

Yet, despite the need to repeal this outdated act, many are concerned that repeal of PUHCA is a repeal of consumer protections. This is simply not true.

It is important to remember that there are more than 3,000 entities currently providing electric and gas service to consumers. Of these, approximately 170 are holding companies. However, approximately 151 holding companies are exempt from PUHCA, leaving PUHCA to regulate the 18 active registered holding companies. Repealing PUHCA does not mean these registered holding companies will no longer be regulated. It only means they will be regulated under other a number of statutes, including all state public utility laws, the Federal Power Act, and the Natural Gas Act. There will be no regulatory gap if PUHCA is repealed.

Yet the cries continue that PUHCA cannot be repealed because it protects consumers. What about the majority of individuals who are served by utilities not covered by PUHCA? Who is currently protecting them?

Repealing PUHCA will not hurt consumers, but retaining the status quo will. If a consumer is served by a company regulated under PUHCA, that company is restricted from entering into competitive transactions, expanding into new business areas and improving efficiencies that could benefit the consumer. While the protections that various PUHCA repeal bills provide for consumers are clear, we should also note the benefits.

In fact, stand alone PUHCA repeal bills introduced in the last two Congresses continue to provide protection for consumers, but eliminates unnecessary agency duplication and deletes arcane provisions that no longer serve a public interest purpose. These repeal bills actually *improve* certain important aspects of federal and state utility regulation if enacted in the current regulated market conditions. Some have indicated that this may be financially burdensome to states; however, the ongoing restructuring of the electric utility system has imposed significant new responsibilities on the states, involving numerous companies and issues. The states have been in the lead in taking on these responsibilities. Surely, with the experience the states have had to date with restructuring issues, they will be able to effectively deal with any potential resource issues.

Various stand alone PUHCA repeal bills also fully provide for protection of consumers by providing access to books and records, by maintaining accountability procedures, providing for review of affiliate transactions and continued FERC and State commission rate regulation and audit authority. These are a far more direct means of addressing market concerns and protecting consumers than PUHCA of 1935 can provide in today's regulated market.

The Repeal PUHCA Now! Coalition recognizes that some state commissioners and other ratepayer advocates have expressed concern that state authority would not be sufficient to obtain the necessary information for proper discharge of state regulatory action. They are concerned that there would be a continuing need, after repeal of PUHCA, for federal audit authority and federal oversight of system transactions that would pass costs through to ratepayers. The Coalition understands those concerns. We also understand the significant difference between repealing the Act while providing for certain safeguards, and simply transferring the existing burdensome requirements to a new forum. We believe PUHCA repeal legislation can fully address these concerns and include provisions to provide appropriate access to books and records. The Coalition is fully prepared to work with the Congress to assure that a final bill includes provisions that would implement any necessary consumer safeguards.

With regard to books and records, all utility companies know full well that the books and records of the utility company must be available to regulators for their review. The burden will remain on a utility to demonstrate that its proposed rates are just and reasonable. Similarly, we understand and can accept a review of the books and records of those affiliates that deal with the utility company and that would thereby pass costs through in rates. Regulators should have access to all information that is relevant in reviewing and establishing rates for electric services. However, there are undoubtedly some affiliates in a diversified company that will not pass costs through to ratepayers, or whose activities are so removed from the utility activities that access to their books and records would be of no *legitimate* value for ratemaking or cost allocation purposes. The key test is what access is actually necessary for the effective and proper discharge of the regulatory authority involved.

As to the oversight of affiliate transactions, again we understand the interest of regulators in reviewing those transactions involving the utility, and which will cause the incurrence of costs to be passed through to ratepayers. Indeed, many state regulatory commissions already review transactions between a utility and its affiliates, and no further authority is needed. Here again, to the extent it affects rates, we do not oppose reasonable affiliate transaction provisions in a PUHCA repeal bill. However, we can also envision a number of transactions between affiliates completely apart from the operating utility companies, and which would not cause the incurrence of costs to the utility. Where the affiliate contractual arrangements are not related to costs to be incurred or passed through in the utility's regulated rates, separate regulatory review of the interaffiliate transactions would be unnecessary.

*Myth No. 4: More utilities will merge if PUHCA is repealed.*

As noted earlier, the competitive transformation of the utility industry is underway. Twenty states have now enacted restructuring legislation or regulations. Similar to every other heavily regulated industry that has undergone a competitive transition, some consolidation of service providers is inevitable. But contrary to myth, whatever consolidation will occur will not escape significant regulatory review and oversight.

It is important to recognize several facts about mergers and market power assertions if PUHCA is repealed. First, the very same expert agencies and departments who today substantively review mergers will do so after PUHCA is repealed. FERC will retain all of its merger authority. It has recently updated its merger policy in light of changes occurring in the electric utility industry. Without PUHCA, FERC will still review future mergers unconstrained by any new *Ohio Power* or other similar regulatory conflicts at the federal level. State Commissions will still have their authority to approve, block or condition mergers that they have today under state law. State legislatures that wish to require that a utility company operating in that state must be incorporated in that state and remain fully subject to the state's authority regarding its securities and other corporate matters, can continue to do so. PUHCA's repeal will have no effect on that. The Department of Justice will retain its antitrust authority, and the FTC its Hart-Scott-Rodino authority. The only thing that will change when PUHCA is repealed is that after all of those approvals are given, the SEC will no longer have the unnecessary and duplicative regulatory burden of again stating its deference to the decisions the regulatory agencies have already reached.

Mr. Chairman, let us be clear: when PUHCA is repealed, no merger will occur without the same full regulatory scrutiny that occurs today. If there are efficiencies and benefits to be gained, those mergers should go forward. If there are not, there is ample regulatory authority in the hands of knowledgeable regulators to stop or condition them.

The Repeal PUHCA Now! Coalition recognizes there is concern that states may not have the resources necessary to handle these new responsibilities. But again, the Coalition notes that the additional resources needed to handle the activities of 18 companies is nothing compared with the responsibilities of regulating the remaining electric and gas utility companies that do not come under the purview of PUHCA. It seems this problem is one of ensuring that this type of review occurs, not by whom it is done.

Simply put, we believe that the nation's state and federal regulators have the ability to review potential mergers and protect the consumer. There is no failure of federal and state utility regulation requiring PUHCA to stay in place to review the inevitable consolidation of the utility industry. In fact, removing the SEC from reviewing mergers does not mean these assurances go away.

#### IV. CONCLUSION

In conclusion, the Repeal PUHCA Now! Coalition believes it has addressed the various issues of concern that have been raised about repeal of this statute which, as the SEC has noted, is outdated and no longer needed. Consumer protections will still be provided, market power problems are not compounded and regulatory guardians will still vigorously oversee the exercise of market power through rate reviews and merger activities. If we are for fair wholesale and retail competition, where numerous firms compete under similar regulatory restrictions, then removal of PUHCA is a key component to a competitive atmosphere. Using PUHCA repeal as a political chit in the restructuring debate exacts a heavy toll on consumers, competition, and certain companies. We urge the Congress to repeal PUHCA this year.

Mr. BARTON. Thank you, Mr. Brooks. We would now like to hear from Mr. Crisson; 5 minutes, please sir.

#### STATEMENT OF MARK CRISSON

Mr. CRISSON. Thank you, Mr. Chairman. Good afternoon. My name is Mark Crisson. I am the CEO of Tacoma Public Utilities and the immediate past-Chairman of the Large Public Power Council. I am testifying today on behalf of that group.

The LPPC is an association of 21 of the largest State and Locally owned electric utilities in the United States. Our members serve approximately 6 million direct retail customers and own and operate 44,000 megawatts of generation, as well as 24,000 circuit miles of transmission lines.

We appreciate the efforts of this committee to advance the debate on how to achieve a competitive market that benefits consumers. Our members believe that unless the private use issue is addressed

by Congress, there can be no truly competitive market. I will focus my comments on this issue.

Private use restrictions, most recently revised by Congress in the 1986 Tax Reform Act, were written prior to the advent of a competitive electric industry. Today, the restrictions form a serious barrier to open competition and customer choice.

Because of the rapid pace of restructuring in the States, it is important that Congress act immediately to fix this problem. Failure to address private use will preclude many public power systems from opening their systems for full competition, and could result in higher rates for consumers, contrary to the goals of electric industry restructuring.

By way of background, public power systems have no practical source of external financing, other than the municipal debt markets. Unlike private companies, public entities cannot issue stock. The current private use rules which apply to our financing, provides that no more than the lesser of 10 percent, or \$15 million of a power plant or transmission line financed with municipal debt, can be sold to a private entity under a customer-specific contract.

In the regulated monopoly world that existed prior to competition, this requirement was problematic, but manageable. In a world of open transmission access, however, it has very serious consequence for our members, their customers, and investors.

Let me provide a couple of examples. First, as you are aware, in its recent proposed rulemaking, FERC has strongly encouraged that all transmission owning utilities participate in regional transmission organizations, RTOs. From the discussion this morning, I know that is a central issue before this committee.

Our group supports the development of RTOs. They are important to the establishment of competitive markets that are both efficient and reliable. At the same time, private use rules may preclude effective participation of public systems in an RTO because an issuer that joins an RTO may not be able to issue tax exempt bonds to finance its transmission facilities.

Worse, we may be required to redeem or defuse outstanding bonds because we could violate the private use rules. Another example, in a competitive environment, large customers will seek and obtain special contracts tailored to meet their specific needs, just as they do in buying any product.

Because of outdated private use rules, a public power utility may be unable to offer such a contract, even to customers in their own service territory, that they have been successfully serving for decades. This could deny that customer the best choice in the market and will lead to loss of customers for the utility for reasons that have absolutely nothing to do with price or quality of service.

Now, there are also consequences for public powers' investors who hold more than \$70 billion in outstanding tax exempt debt, but I will refer you to my written testimony for further details on those impacts. Consequently, Mr. Chairman, as a result of these problems, our members will find it difficult to support restructuring legislation that does not provide private use relief, using the same bill on companion legislation from the Tax Committees. Now, we recognize that the Commerce Committee's jurisdiction does not

permit it unilaterally to deal with all pending tax and non-tax restructuring issues.

However, we are confident that the Commerce and Ways and Means Committees can work together on this issue. With respect to the bills currently before your committee, the LPPC endorses the private use provisions of the retail competition bill introduced by Congressmen Largent and Markey in H.R. 2050.

These provisions allow publicly owned utilities to elect to grandfather existing tax exempt debt, freeing them from restrictive private use rules. In this way, publicly owned utilities will bring the benefits of competition to their customers.

In exchange, these utilities would permanently forego the ability to issue future tax exempt debt to build new generating facilities. We also understand that Chairmen Bliley and Barton are working to fashion a compromise comprehensive restructuring proposal that will address private use and other tax issues.

We strongly encourage the committee to pursue this path. Thank you, Mr. Chairman.

[The prepared statement of Mark Crisson follows:]

PREPARED STATEMENT OF MARK CRISSON, CEO, TACOMA PUBLIC UTILITIES ON  
BEHALF OF THE LARGE PUBLIC POWER COUNCIL

My name is Mark Crisson, and I am CEO of Tacoma Public Utilities. I am the immediate past Chairman of the Large Public Power Council, and I am testifying today on behalf of that group. We appreciate the efforts this Committee has made to advance the debate on how to achieve a competitive market that benefits consumers, and would like to offer the Large Public Power Council's assistance in crafting legislation to facilitate competitive markets.

There are many issues that will be addressed by various witnesses today, but I will focus my comments today on a matter of pivotal importance to the Large Public Power Council's customers—private use restrictions that stand to deny public power customers the benefits of competition. Having said that, I would like to emphasize that our members believe that unless the private use issue is addressed by Congress, there can be no truly competitive market.

The Large Public Power Council ("LPPC") is an association of 21 of the largest state and locally-owned electric utilities in the United States. Our members directly serve approximately 6,000,000 direct retail customers, and own and operate over 44,000 megawatts of generation, or about 11 percent of the nation's total capacity. In addition, we own and operate in excess of 24,000 circuit miles of transmission lines. LPPC's members are located throughout the country in states including Washington, Texas, Arizona, California, Florida, Georgia, New York and Tennessee.

Since its inception, the LPPC has focused on transmission policy as a critical issue for its members. The LPPC was the first group of transmission owning utilities which expressed support for open transmission access in the debates preceding the Energy Policy Act of 1992. At the same time, we led the way in developing and promoting regional transmission entities as a mechanism to manage and operate the transmission system in an open access environment. In addition to addressing the private use issue, we look forward to working with the Committee to develop transmission policies that ensure nondiscriminatory access to public power transmission facilities while recognizing that it may not be feasible to govern access to investor-owned and public power transmission by identical rules.

*Private Use*

The most compelling issue for LPPC's members today is private use restrictions. These restrictions, most recently revised by Congress in the 1986 Tax Reform Act, were written prior to the advent of a competitive electric industry. Today, the restrictions form a serious barrier to open competition and customer choice. Because of the rapid pace of restructuring in the states, it is important that Congress act immediately to fix this problem. Failure to address private use will preclude many public power systems from opening their systems to full competition, and could result in higher rates for consumers, contrary to the goals of electric industry restructuring. In my testimony, I will outline the private use problem, and further explain

why federal legislation to provide fair competition that benefits all consumers cannot work without private use relief.

#### *Background*

By way of background, public power systems have no practical source of external financing other than the municipal debt markets. Unlike private companies, public entities cannot issue stock. The private use rules which apply to our financing provide that no more than the lesser of 10 per cent, or \$15 million of a power plant or transmission line financed with municipal debt, can be sold to a private entity under a customer-specific contract. In the regulated monopoly world that existed prior to competition, this requirement was problematic but manageable. In a competitive world of open transmission access, it has very serious consequences for our members, their customers, and investors.

#### *The Problem*

In practice, here's what the private use rules mean in a competitive environment, which already is a reality in the wholesale market and which is becoming a reality in the retail market in nearly half of all the states :

1. In its recent Notice of Proposed Rulemaking, FERC has strongly encouraged that all transmission-owning utilities participate in Regional Transmission Organizations (RTOs). Furthermore, Congress is considering legislative proposals that give FERC the authority to require participation in RTOs. We support the development of RTOs as important to the establishment of competitive markets that are both efficient and reliable. At the same time, private use rules may act to preclude effective participation of public systems in an RTO, because an issuer that joins an RTO may not be able to issue tax-exempt bonds to finance its transmission facilities, or worse, may be required to redeem or defease outstanding bonds.
2. In a competitive environment, large customers will seek and obtain special tailored contracts to meet their specific needs, just as they do in buying any product. Because of outdated private use rules, a public power utility may be unable to offer such a contract, *even to customers in their own service territory that they have been successfully serving for decades*. This could deny that customer the best choice in the market, and will lead to loss of customers for the utility for reasons that have absolutely nothing to do with price or quality of service.
3. If a public power system loses a customer in a competitive environment (and all utilities will lose customers), the public system may be unable to re-market the generating capacity it had built to serve that lost customer as a result of the private use rules. Thus, any excess capacity that a public system has may become idle and unproductive for the economy solely as a result of the private use tax rules. Inability to resell the capacity can lead to significant financial losses and reductions in overall economic efficiency. The bottom line: the remaining customers of that utility would pay higher costs.

In summation, penalties for public power customers come in the form of higher rates, at a time when competition is supposed to be reducing rates. The consequences for public power's investors, which hold more than \$70 billion in outstanding tax exempt debt issued to finance the generation, transmission and distribution facilities, are equally undesirable. Public power's investors include a broad spectrum of people who have invested in this debt either directly or indirectly through mutual funds to fund their retirements, college educations, and other needs. They rely on the ability of public power systems to repay them through the sale of power from the assets they financed. Failure to deal with the private use issues, however, may cause downgrades of public power bonds, and lead to increased turbulence in the public power debt market. This in turn may impact other segments of the municipal debt market, upon which states, cities and towns rely to finance necessary infrastructure. Turbulence and uncertainty in these markets leads to higher borrowing costs, all of which ultimately will be absorbed by investors, citizens and customers.

#### *Legislative Solution*

Mr. Chairman, you have asked me to identify which elements of the various proposals before you are essential to comprehensive federal legislation. While I am sure we could agree on certain elements of the proposals which are designed to ensure reliability and provide fair rules of the road for competition, in our view, for our members, one issue acts as the linchpin for the entire restructured market—meaningful relief from the existing, anti-competitive private use restrictions. Our members will find it difficult to support restructuring legislation that does not provide private use relief—either in the same bill or in companion legislation from the tax

committees. We need to address private use in a manner that permits public power to continue to provide its customers with competitive, low-cost, reliable power. We recognize that the Commerce Committee's jurisdiction does not permit it unilaterally to deal with all pending tax and non-tax restructuring issues; however, we are confident that the Commerce and Ways and Means committees can work together to resolve this issue.

With respect to the bills currently before this Committee, the LPPC has endorsed the private use provisions of the retail competition bill introduced by Congressmen Largent (R-OK) and Markey (D-MA). Just as the overall bill represents bipartisan compromise, its private use provisions, which also have been introduced by Congressmen Hayworth (R-AZ) and Matsui (D-CA), represent a fair solution. These provisions allow publicly-owned utilities to elect to grandfather existing tax-exempt debt incurred to build generation facilities, and permits them to operate outside of restrictive current private use rules. In this way, publicly-owned utilities will be able to bring the benefits of competition to their customers. In exchange, publicly-owned utilities would permanently forgo the ability to issue future tax-exempt debt to build new generating facilities. Those utilities that do not elect to terminate issuance of tax-exempt debt would remain subject to modified private use rules.

We also understand that Chairmen Bliley and Barton are working to fashion a compromise comprehensive restructuring proposal that will address private use and other tax issues. We encourage the Committee to pursue this path.

In conclusion, the LPPC believes that the Committee is moving in a positive direction on retail competition issues. We would like to work with you to ensure that the Largent-Markey private use provisions are enacted by this Congress, and through that effort, offer our assistance in supporting this Committee's efforts on broader restructuring issues, including transmission policy.

Thank you for the opportunity to testify before you today.

Mr. BARTON. Okay, Mr. Crisson. We appreciate you coming from Washington to share that message; Washington State, that is, not Washington, DC. We would now like to hear from Mr. Parkel from the AARP for 5 minutes.

#### **STATEMENT OF JAMES G. PARKEL**

Mr. PARKEL. Thank you, Mr. Chairman.

My name is Jim Parkel. I am a member of the AARP National Board of Directors. We thank Chairman Barton and the other members of the committee for inviting us to present our views on the consumer protection provisions of electric utility restructuring legislation introduced to this Congress.

We will confine our comments to H.R. 1828 and H.R. 2050. These two bills specifically address the major areas of concern that AARP outlined in May's testimony before this committee. In short, AARP wants to ensure that the residential customer benefits from competition. That there is a strong consumer protection provision in place, and that electric utility service is available to all.

AARP believes strongly that residential customers should benefit from restructuring. Unfortunately, residential consumers are simply not as attractive to utilities as industrial consumers are. However, one means to strengthen the position of residential consumers is through aggregation.

Aggregation will allow residential consumers to pool their respective electric needs, enabling them to negotiate lower rates from a power provider and benefit from the outset. AARP supports a Federal role in facilitating aggregation.

The AARP commends the sponsors of H.R. 1828 and H.R. 2050 for including provisions that require States to allow aggregation. We believe that legislation would benefit residential consumers. Further, if language were included recommending that municipal aggregation be done on an opt-out basis.



The opt-out provisions would ensure that a majority of underserved consumers would reap and could reap the benefits of lower rates. For competition in the electricity industry to work, strong consumer protection laws must be applied to the sale of electricity in a restructured industry.

We are pleased that both H.R. 1828 and H.R. 2050 include provisions that will take advantage of the unique opportunity to prevent fraudulent activity. For starters, the anti-slamming and anti-cramming provisions will go a long way toward addressing these practices. In addition to providing the FTC with the tools to counter slamming and cramming, Congress should consider enacting a truth in billing requirement.

A comprehensive, easy to read billing statement each month would better inform consumers. AARP strongly believes that providing such information to consumers will help alleviate confusion, making them more likely to become participants in a competitive marketplace. AARP is pleased that the need for information disclosure is increasingly understood by the policymakers and reflected in the legislation. Both H.R. 1828 and H.R. 2050 include important provisions outlining the kind of information that suppliers must present to consumers when offering their services.

Finally, we applaud Representatives Largent and Markey's plan for the protection of individual privacy, placed on the information exchange, included in H.R. 2050. AARP values the individual's right and ability to control the movement of personal information.

We are pleased that the provisions in H.R. 2050 recognize that right. As we have said previously, electric utility service is essential. It is arguably more important to the residential consumer than phone service. Unfortunately, none of the legislation introduced to-date provides adequately for a Federal role in the area of universal service.

H.R. 2050 recognizes universal service through, "a sense of the Congress." H.R. 1828 attempts to address the universal service issue through a proposed Public Benefits Fund. Our written statement details our concerns with both these approaches and offers a solution.

AARP hopes that as legislation moves toward passage in the House, the provisions we have discussed today remain in tact or are strengthened. We urge this committee to remember that residential consumers will benefit from restructuring only if aggregation is facilitated, strong consumer protection provisions are enacted, and electric service is ensured for all.

Thank you very much.

[The prepared statement of James G. Parkel follows:]

PREPARED STATEMENT OF JAMES G. PARKEL, BOARD OF DIRECTORS, AARP

Mr. Chairman and Members of the Committee: My name is Jim Parkel and I am a member of AARP's Board of Directors. We thank Chairman Barton and the other members of the Committee for inviting us to present our views on the consumer protection provisions of various pieces of legislation introduced this Congress dealing with the restructuring of the electric utility industry. While we will make mention of provisions in other pieces of legislation, we will confine the majority of our comments to H.R. 1828 and H.R. 2050. The former, authored by the Administration and sponsored by Chairman Bliley, and the latter, sponsored by Reps. Largent and Markey, specifically address AARP's major areas of concern.

AARP's membership has a vested interest in the move towards competition now underway in the electric utility industry. For everyone, electricity is a basic necessity of modern life. The cost of this necessity, however, can comprise a significant portion of an average consumer's personal expenditures. In fact, energy costs can take up to as much as 5 percent of the median-income household's monthly budget. Older Americans are particularly vulnerable to rapid increases in energy prices. Although older persons consume approximately the same amount of residential energy as non-elderly Americans do, they devote a higher percentage of total spending to residential energy. Among low-income older families, an average of 17.5 percent of their income is spent on residential energy. Too often, low-income older persons are faced with the choice of risking their health and comfort by cutting back on energy expenditures or reducing spending for other basic necessities.

In testimony AARP presented to this Committee earlier this year, we discussed generally our concerns surrounding the move to retail competition. We questioned the claims that retail competition would bring about substantial rate reductions for all ratepayers, including the elderly. We also expressed hope that consumers would receive the corollary benefits of the ability to shop among competitive providers, and to take advantage of a new array of products and pricing options. We concluded that the fate of residential consumers in a restructured electric industry will depend on whether the new market structure gives them a fair chance to receive the benefits of competition, ensures that their interests are represented in the market, and provides fundamental protections against abuse.

Residential ratepayers, and particularly older Americans, face very significant risks—and few, if any, assured benefits—in the move to retail competition in the electric power industry. These risks go beyond the ability to benefit from choice. They also include risks associated with confusion, deception and fraud.

AARP's concerns have led us to question the need for federal legislation. However, as restructuring activity in the individual states continues, issues have crystallized that require congressional action. Still, until recently, AARP continued to have doubts because the issues we deem important to residential consumers were not being addressed by federal lawmakers. That has changed.

The most significant factor in that change has been the elimination of the mandate to the states to restructure their markets—otherwise known as a “date certain.” AARP has expressed its opposition to that proposal repeatedly. That barrier now removed, we can discuss the positive potential that passage of federal legislation might hold for consumers. Our testimony today will focus on how legislation introduced to date has addressed AARP's goals to:

- Ensure that residential customers are among the first to benefit from competition;
- Provide strong consumer protection provisions; and
- Establish a comprehensive universal service policy, including a guarantee of affordability.

#### *Residential Customers First*

AARP believes strongly that residential customers should benefit from restructuring. Unfortunately, residential consumers are simply not as attractive to utilities as industrial customers are.

I think that an experience a fellow member of AARP's Board of Directors had last October is illustrative of this point. He represented residential consumers in a panel discussion on electric utility restructuring. The remainder of the panel was made up of decision-makers from utilities, industrials, power marketers, regulatory bodies and Wall Street investors. The spontaneous discussion focused on scenarios offered by the moderator. The scenarios were set on a timeline beginning with the opening of a competitive market and running well into the first few decades of the 21st century. It is instructive to note that the residential consumer was not brought into the discussion until the market had been open for 10 years!

All is not hopeless, however. Aggregation will allow residential consumers from like communities or associations to pool their respective electricity needs, enabling them to negotiate lower rates from a power provider and benefit from the outset.

AARP supports a federal role in facilitating aggregation. On the state level, we have been promoting municipal aggregation with a voluntary opt-out procedure. We favor allowing non-governmental entities to become aggregators as well. AARP commends the sponsors of H.R. 1828 and H.R. 2050 for including provisions that require states to allow aggregation. We suggest that the legislation would benefit residential consumers further if language were included recommending that municipal aggregation be done on an opt-out basis. The opt-out provisions would ensure that a majority of underserved consumers would reap the benefits of lower rates.

### *Consumer Protection Laws*

For competition in the electricity industry to work, strong consumer protection laws must be applied to the sale of electricity in a restructured industry. Low-income, non-English speaking and elderly consumers, in particular, will need very strong consumer protections to prevent abuse in the competitive market. Legislation introduced in the last Congress neglected to focus any attention on protecting the residential consumer.

We are pleased that both H.R. 1828 and H.R. 2050 include provisions offered by AARP to address consumer protection concerns. The proactive approach to addressing the specific problems of slamming, cramming and information disclosure is to be commended.

The sponsors of H.R. 1828 and H.R. 2050 have taken advantage of the unique opportunity to nip fraudulent activity in the bud. If enacted, the anti-slamming and anti-cramming provisions will go a long way towards addressing these abuses.

In addition to providing the FTC with the tools to counter slamming and cramming, Congress could put in place another measure that would reduce incidents of fraud while providing the consumer with valuable and necessary information. A "Truth-in-Billing" requirement is of paramount importance to consumers and would serve the best interests of electric utility service providers as well. We recognize that the functional components of metering and billing are under state jurisdiction, but a regulation similar to the one recently approved by the Federal Communications Commission would provide consumers with a wealth of information, in a form that is "user friendly" without preempting state authority.

It is undeniable that as various industries continue to converge, and the utility billing statement becomes a more attractive means to bill for services, consumers are likely to become more and more confused by what they are being asked to pay for. A comprehensive, easy-to-read billing statement each month will enable consumers to better track what services are being provided, who is providing them, at what cost they are being provided, what additional taxes or charges are being imposed and whom they can call if they have a dispute. Other items that should be displayed on the billing statement include information regarding service interruption and the mix of resources used to generate the power. We also support the use of standardized language in describing fees or charges that are being imposed on consumers. AARP strongly believes that providing such information to consumers will help alleviate confusion, making them more likely to become participants in the competitive marketplace.

AARP is pleased that the need for information disclosure is increasingly understood by policymakers and reflected in legislation. Both H.R. 1828 and H.R. 2050 include provisions outlining the kind of information that suppliers must present to consumers when offering services. Many of the details that we have proposed to be included in billing statements are included in this section of the respective bills. Further, H.R. 2050 clarifies that states may impose additional requirements. Again, this kind of "consumer information floor" is what we are seeking in a "truth-in-billing" provision.

AARP also supports the creation of a consumer database to assist residential customers in obtaining information about retail electric utility providers, including aggregators, as called for in H.R. 1828. However, we suggest housing the database at the FTC, an agency whose traditional role and primary mission has been consumer protection, rather than DOE as proposed.

To protect consumers, licensing requirements and safeguards against fraud must also be put in place. As large aggregators, utility companies and power marketers are likely to operate on an interstate basis, it is incumbent upon the Congress to ensure that they meet certain threshold operational requirements and that deceptive, fraudulent or other illegal behavior not be tolerated.

Finally, we applaud Reps. Largent and Markey for the detailed restrictions placed on information exchange included in H.R. 2050. AARP values the individual's right and ability to control the movement of personal information. We are pleased that the provisions in H.R. 2050 recognize that right.

### *Universal Service*

As we have said previously, electric utility service is essential. It is arguably more important to the residential consumer than is telephony. Therefore, one of the cornerstones in any restructuring effort is the requirement that electric utility service be universal and affordable. A universal service policy must ensure basic electric service at a level of consumption that would meet the needs of residential ratepayers for lighting, heating, cooling, cooking, and recreation. In our view, affordability means that electricity rates do not strain the household budget.

AARP is concerned that in a competitive environment, less attractive customers will be adversely affected. While we recognize that there have been problems with the universal service program in telecommunications, we believe these problems need not carry over into the electric utility arena.

Unfortunately, none of the legislation introduced to date provides adequately for a federal role in the area of universal service. H.R. 2050 recognizes universal service through a "Sense of the Congress," but places the full burden on the states to collect fees and implement the program. In H.R. 1828, the Administration has made an attempt to address universal service through a proposed Public Benefits Fund. Our concern with this fund is that it renders low-income energy assistance an option, not a requirement. Further, we are concerned that the cost of the program may ultimately be borne by all consumers as a line-item charge "effectively a new tax. We recommend rather that the costs of implementing a universal service system be placed on all generators of electricity based on a standard formula.

#### *Conclusion*

We would be remiss if we did not acknowledge the fact that six other pieces of legislation have been introduced in this Congress on electric utility restructuring. They deal with critical topics ranging from PUHCA and PURPA repeal to reforming the power marketing administrations. Both H.R. 1828 and H.R. 2050 also include sections that address those areas, as well as addressing concerns regarding stranded cost recovery and the private use issue. AARP has offered suggestions to decision-makers based on our policy positions in those areas.

However, we have been invited here today to discuss consumer protection—and we are pleased that there is legislation in this area to discuss.

AARP hopes that as legislation moves toward passage in the House, the provisions we have discussed today remain intact or are improved. We urge this Committee to remember that residential consumers will benefit from restructuring only if aggregation is facilitated, strong consumer protection provisions are enacted and electric service is ensured for all.

Mr. Chairman, the work that you have done to highlight many of the inherent problems in the move to a deregulated environment this Congress is to be commended. Further, we applaud the sponsors of H.R. 1828 and H.R. 2050 for their meaningful efforts to address the need for consumer protection. AARP looks forward to continuing our active participation in this debate on both the federal and state level and to working with you in crafting solutions that will ultimately benefit not only our members, but the nation as a whole.

Mr. BARTON. Thank you, Mr. Parkel.

The Chair would recognize Ms. Zannes for her opening statement.

#### **STATEMENT OF MARIA ZANNES**

Ms. ZANNES. Thank you. Good afternoon, Mr. Chairman and members of the subcommittee. My name is Maria Zannes and I am President of the Integrated Waste Services Association. The IWSA is the Nation's leading waste-to-energy trade association. Our members would like to thank and commend Chairman Barton and other members of the subcommittee for their leadership on this issue.

The IWSA represents power plants that are dual purpose. We dispose of household trash and generate clean, reliable electric energy. Nationwide, waste-to-energy power plants generate more than 2,700 megawatts of electricity for more than 32 million tons of trash each year.

Nearly 40 million people in 31 States safely dispose of their trash at one of the 103 waste-to-energy power plants in this country. Nearly 2.5 million homes plug into trash power. Revenues from electricity sales benefit the cities that use waste-to-energy facilities, and these same cities that use waste-to-energy will be directly impacted by the changes to the electricity marketplace.

For these reasons, the U.S. Conference of Mayors and the Solid Waste Association of North America support the recommendations we are making here today. We urge the committee to include, as it seems to have, legislative provisions that preserve the rights and remedies of parties with existing PURPA contracts, to continue a long-standing recognition of waste-to-energy and landfill gas utilization as renewable energy sources, and that encourage the use of renewable energy in tomorrow's electricity marketplace.

The majority of States in which waste-to-energy plants operate, that have passed restructuring legislation, have embraced all three of these principles. Several of the measures now before this committee prospectively repeal Section 210 of PURPA and we join other independent power producers in supporting the strong contract sanctity provisions contained in virtually all of the bills.

Waste-to-energy has been continuously recognized as a renewable energy source since the earliest drafts of PURPA in 1977. More than 80 percent of the trash we use as fuel, is organic biomass. Trash is sustainable. It is indigenous to basic criteria for establishing what is a renewable energy source.

Waste-to-energy is included under the term "biomass" in PURPA, as well as in the Federal Power Act Amendments of 1978, the Federal Energy Regulatory Commission regulations governing biomass energy, the Clean Air Act Amendments of 1990, and Department of Energy policy. We see no reason for legislation to reverse long-standing policy.

Moreover, there are good environmental reasons to continue this policy on renewable energy. Our industry is a case in point. We are completing a more than \$400 million retrofit on existing facilities to equip plants with the most modern pollution control equipment available. In fact, our industry is significantly cleaner than traditional fuels with respect to such environmental impacts as acid rain potential, global warming potential, and natural resources depletion.

For example, the use of waste to energy technology prevented the release last year into our atmosphere of more than 4 million tons of methane, 15 million tons of carbon dioxide, as well as nearly 25,000 tons of nitrogen oxides, and 5,000 tons of volatile organic compounds. Environmental provisions in any bill are as much an economic issue to us as an environmental consideration.

Credit, we believe, should be provided to those suppliers that improve their technology by the use of modern pollution control equipment. A pure market may not be best suited at providing so-called public goods, such as a clean environment or fuel diversity.

There is also a mismatch in the electricity context between the short term investment horizons of consumers and the long-term investment requirements of capital-intensive power projects. It is therefore particularly important that government energy policymakers consider at least the environmental consequences of deregulation. In this context, continued governmental support for renewable energy is essential. This is true not only for the obvious health and environmental reasons, but for the economic security that renewables provide in the form of an insurance policy against becoming overly reliant on any single fuel.

The larger the share of renewables in the electricity generation mix, and the more diverse the mix of renewables, the greater reduction and overall electric price volatility. We, therefore, support a renewable portfolio standard as one way to support renewables.

In summary, we support legislative provisions that keep contracts whole and give waste-to-energy and other renewable energy a place in the emerging electricity marketplace. Thank you.

[The prepared statement of Maria Zannes follows:]

PREPARED STATEMENT OF MARIA ZANNES, PRESIDENT, INTEGRATED WASTE SERVICES ASSOCIATION

I. INTRODUCTION

Good afternoon, Mr. Chairman and members of the subcommittee. Thank you for providing me with the opportunity to testify today. My name is Maria Zannes, and I am president of the Integrated Waste Services Association ("IWSA"). The IWSA is the nation's leading waste-to-energy trade association. Our members would like to commend Chairman Bliley and Chairman Barton and the committee for its leadership in tackling the complex issues facing a restructured electricity marketplace.

The IWSA represents power plants that are dual purpose. We dispose of household trash and generate clean, reliable electric energy. Nationwide, waste-to-energy power plants generate more than 2,700 megawatts of electricity from more than 32 million tons of trash each year. Nearly 40 million people in 31 states safely dispose of their trash at one of the 103 waste-to-energy power plants in the country. Nearly two and a half million homes plug into trash power.

Revenues from electricity sales benefit the cities that use waste-to-energy facilities. Those same cities that use waste-to-energy will be directly impacted by changes—either for the good or for the bad—to the electricity marketplace as a result of federal legislation. For these reasons, among others, the U.S. Conference of Mayors and the Solid Waste Association of North America ("SWANA") support the recommendations made here today.

The IWSA urges the committee to include legislative provisions that preserve the rights and remedies of parties with existing PURPA contracts; that continue a long-standing recognition of waste-to-energy and landfill gas utilization as renewable energy sources; and that encourage the use of renewable energy in tomorrow's electricity marketplace.

The majority of states in which waste-to-energy plants operate that have passed restructuring legislation have embraced all three of these principles.

II. CONTRACTS SHOULD BE PRESERVED

Several of the measures now before this committee prospectively repeal section 210 of PURPA which includes the mandatory power purchase provisions. We join other independent power producers in supporting strong contract sanctity provisions that preserve the rights and remedies of parties with PURPA contracts now in effect. We urge the committee to make plain in any legislation that existing contracts will not be affected by the prospective repeal of PURPA.

We support the contract sanctity provisions of H.R. 2050 as introduced by Congressmen Largent and Markey.

III. WASTE-TO-ENERGY AS A RENEWABLE SOURCE OF POWER

Waste-to-energy power has been considered a renewable source of electricity in this country for more than twenty years, and has been continuously recognized as a renewable energy source since the earliest drafts of PURPA in 1977. More than 80 percent of the trash we use as fuel is organic biomass, according to the U.S. Department of Energy. Trash is both sustainable and indigenous—two basic criteria for establishing what is a renewable energy source. Waste-to-energy is included under the term "biomass" in PURPA, as well as in the Federal Power Act Amendments of 1978, the Federal Energy Regulatory Commission regulations governing biomass energy, the Clean Air Act Amendments of 1990, and Department of Energy policy.

We see no reason for legislation to reverse long standing policy.

Moreover, there are good reasons to continue this policy from an environmental standpoint. Our industry is completing a more than \$400 million retrofit on existing facilities to equip plants with the most modern pollution control equipment available. We are one of the first industries to be subject to new Clean Air Act rules.

We meet some of the most stringent environmental standards in the world. In fact, our industry is significantly cleaner than traditional fossil fuels with respect to such environmental impacts as acid rain potential, global warming potential and natural resources depletion.

The use of waste-to-energy technology prevented the release last year into our atmosphere of more than 4 million tons of methane, and 15 million tons of carbon dioxide, as well as nearly 25,000 tons of nitrogen oxides, and 5,000 tons of volatile organic compounds.

We support environmental provisions that "level the playing field" for generators of electricity. This is as much an economic issue as it is an environmental consideration. Credit should be provided to those suppliers that improve their technology by the use of modern pollution control technology.

The stellar results from the retrofit of the waste-to-energy industry is a case in point. The U.S. Environmental Protection Agency estimates that the waste-to-energy industry has decreased mercury emissions by more than 90 percent, to less than three percent of EPA's inventory of mercury emissions from industry; and decreased organic emissions such as dioxin by more than 99 percent, to less than one-half of one percent of EPAs estimate of manmade dioxin emissions.

#### IV. RENEWABLES SHOULD BE ENCOURAGED

An unfettered, competitive market may not be well suited to make all the decisions on resource allocation for our society. A pure market is simply inefficient at providing so-called public goods such as a clean environment or fuel diversity. There is also a mismatch in the electricity context between the short term investment horizons of the consumer and the long term investment requirements of capital intensive power projects. It is therefore particularly important that government energy policy makers not lose sight of the environmental consequences of the rapid deregulation of the electric generation industry.

In this context, continued governmental support for renewable energy, including biomass, waste fuels, solar, wind and landfill gas, is essential. This is true not only for the obvious health and environmental reasons, but for the economic security that renewables provide for consumers. Non-depletable, indigenous energy resources constitute an insurance policy against becoming overly reliant on—and therefore vulnerable to the potential price fluctuations of supply shortages of—any single fuel. consumers may enjoy unleashing supply and demand forces for as long as there is an overhang of capacity. However, we should remember that the larger the share of renewables in the electric generation mix, and, equally important, the more diverse the mix of renewables, the greater the reduction in overall electric price volatility.

IWSA supports provisions in H.R. 1828 and H.R. 2050 that call for a renewable portfolio standard. Many states in which we operate, including California, Oregon, Massachusetts, Connecticut, New Jersey, and New Hampshire, have included an RPS in their restructuring laws, and have defined waste-to-energy as a renewable. While an RPS may not be the only method to encourage renewable power, it is perhaps the most assured way to keep renewables part of the mix because it mandates that some small percentage of power will come from renewable sources.

#### V. CONCLUSION

In summary, we support legislative provisions that keep contracts whole, and give waste-to-energy and other renewable energy a place in the emerging electricity market. Thank you.

Mr. BARTON. Thank you. We would now like to hear from Mr. Marty Kanner who is with the Consumers For Fair Competition. Mr. Kanner.

#### STATEMENT OF MARTY KANNER

Mr. KANNER. Thank you, Mr. Chairman.

Consumers For Fair Competition is a broad and diverse coalition of interests dedicated to formation and promotion of a competitive market structure. We have had the pleasure and benefit of testifying before your subcommittee before on the issue of market power. As such, my comments today will focus on the bills and provisions, and how they address the issues of market power.

In general, CFC is encouraged by the recognized need to address these issues. However, we believe the pending bills, to varying degrees, lack sufficient tools and guidance to fully combat the varied and multiple ways in which the exercise of market power can and most likely will frustrate the development of competitive markets.

The potential for market power abuse cannot be adequately addressed by market forces, Federal anti-trust enforcement, or State restructuring laws. As noted by many of the witnesses on the first panel today, Congress must include provisions in Federal restructuring legislation to ensure that the transmission grid operates independently of electricity market participants, alleviate overly concentrated generation markets that will sustain high prices, entry barriers, and inefficient markets, scrutinize the competitive implications of all utility mergers, provide State regulators with access to utility books and records, and provide model, enforceable standards to prevent utility cross-subsidization.

Finally, establish mandatory reliability standards that ensure system integrity and prevent unfair market manipulation. With these objectives in mind, I offer the following observations and recommendations on the bills pending before this subcommittee. CFC encourages this subcommittee to adopt the regional transmission organization provisions of the Largent-Markey bill.

CFC commends the administration for proposing similarly strong RTO language, and also commends Representative Stearns for recognizing the need to advance independence of the transmission grid. On the issue of market concentration, CFC would urge this subcommittee to adopt the provisions of the Delay-Markey bill of last Congress.

In the alternative, Section 104 of the Largent-Markey bill should be revised and strengthened to correct the limitations of scope and authority that are outlined in my testimony. CFC encourages this subcommittee to adopt the merger provisions of H.R. 1828, the administration's bill, and also provide for FERC review of electric and gas convergence mergers.

CFC urges this subcommittee to adopt measures that parallel the affiliate transaction provisions contained in the 1996 Telecommunications Act. Finally, we urge this subcommittee to adopt the reliability provisions contained in both H.R. 2050 of the Largent-Markey bill, as well as the administration's proposal. Consumers For Fair Competition does not support adoption of H.R. 2363 on a stand-alone basis.

In addition, we believe that PUHCA repeal should be delayed to provide adequate opportunity for replacement market power provisions and retain competition to take hold. For that reason, we prefer the conditional repeal provided in the Largent-Markey bill, and prefer the 18-month effective date contained in various proposals pending before this subcommittee.

To promote the transition to competitive electricity markets, affirmative steps must be taken to remove the vestiges of the former regulatory system and its accumulated opportunities to exercise market power. Once done, the transition to competition can occur. The need for active regulation will subside, and the intended consumer benefits will be realized. Thank you very much, Mr. Chairman.



[The prepared statement of Marty Kanner follows:]

PREPARED STATEMENT OF MARTY KANNER ON BEHALF OF CONSUMERS FOR FAIR COMPETITION

Mr. Chairman, Members of the Subcommittee, I am Marty Kanner. I am testifying today on behalf of Consumers for Fair Competition (CFC), a coalition of small business interests, power marketers, consumer and investor owned utilities, small and large electric consumer representatives, and environmentalists.<sup>1</sup> While the interests of these organizations in the broader restructuring debate are diverse, we are unified in the belief that the intended benefits of competition will not be realized or sustained if market power issues are not adequately addressed in federal legislation.

Given the coalition's focus, my testimony will address only the treatment of market power issues in the pending restructuring bills and will not address the broader issues contained in these bills nor those bills (such as H.R. 971, H.R. 1138, and H.R. 1486) in which CFC as a coalition has no formal position.

In general, CFC is encouraged by the recognized need to address market power concerns. However, we believe the pending bills lack sufficient tools and guidance to fully combat the varied and multiple ways in which the exercise of market power can and will be used to frustrate the development of competitive markets.

CFC looks forward to continuing to work with the Subcommittee to address this central issue in the restructuring debate.

*Fostering Competition*

At its core, restructuring legislation is intended to combat market power—removing monopoly provision of retail electric supply. However, simply declaring open retail markets does not remove all of the structural impediments to competitive markets.

First, the continued vertical integration of the industry provides opportunities for utilities to manipulate the transmission system to advantage their own generation or power marketing activities. Second, many generation markets remain highly concentrated with high barriers to entry, resulting in above-market prices and inadequate market development. Third, many market participants will participate in both regulated markets (transmission and distribution) and competitive markets (generation, marketing, energy and non-utility services), which provides considerable opportunities for cross-subsidization and other anti-competitive practices.

As CFC has previously testified before this Subcommittee, the potential for market power abuse cannot be adequately addressed by market forces, federal anti-trust enforcement or state restructuring laws. Congress must include provisions in federal restructuring legislation to:

- Ensure that the transmission grid operates independent of the electricity market participants
- Alleviate overly-concentrated generation markets that will sustain high prices, entry barriers and inefficient markets
- Scrutinize the competitive implications of all utility mergers
- Provide state regulators with access to utility books and records and provide model, enforceable standards to prevent utility cross-subsidization
- Establish mandatory reliability standards that ensure system integrity and prevent unfair market manipulation
- Prevent impermissible cross-subsidization and cost shifting in order to establish fair and open competitive markets.

*Independent Transmission Operations*

The vertical integration of the electric utility industry is largely incompatible with the needs of the competitive market. Despite the progress that has been made as a result of the Energy Policy Act and FERC Orders 888 and 889, the nation's trans-

<sup>1</sup>American Public Power Association, Electricity Consumers Resource Council (ELCON), Enron, Friends of the Earth, Madison Gas & Electric, Missouri River Energy Services, National Association of State Utility Consumer Advocates (NASUCA), Northern California Power Agency, Ohio Municipal Electric Association, Transmission Access Policy Study Group (TAPS), Wisconsin Public Power Inc., National Alliance for Fair Competition (members include: Air Conditioning Contractors of America, Air Conditioning & Refrigeration Wholesalers Association, American Supply Association, Associated Builders and Contractors, Independent Electrical Contractors, Petroleum Marketers Association of America, Plumbing, Heating and Cooling Contractors—National Association, National Electrical Contractors Association, Sheet Metal and Air Conditioning Contractors National Association)

mission grid is not operated on a non-discriminatory and competitively neutral basis, and fails to fully promote or support a competitive generation market.

Today, each utility's transmission network, despite a certain amount of reliability coordination, is operated largely as if it were an isolated island. This unnecessarily constrains and contracts markets. By acting in their own self-interest, owners can:

- reserve the majority of transmission capacity for their own use (which use is not effectively subject to FERC comparability standards),
- operate the system to favor its own (or affiliates') wholesale or retail marketing function,
- take actions ostensibly for reliability purposes—such as congestion management and emergency curtailment procedures—in a discriminatory and anti-competitive manner, and
- fail to make transmission investments that would alleviate congestion and promote the competitive market.

CFC believes that ownership and/or control of the nation's transmission system must be transferred to truly independent regional bodies with strong authority to operate, plan, maintain and expand the transmission system. Such action will:

- ensure all market participants have equal and nondiscriminatory access to transmission services;
- facilitate competition by eliminating “pancaking” of multiple transmission charges and thereby expanding the physical scope of markets;
- eliminate opportunities for the exercise of vertical market power;
- reduce horizontal market power in generation by expanding the geographical scope of the market; and
- insure that transmission additions occur to eliminate bottlenecks, improve reliability, and facilitate construction of new generation.

*Legislative Review:* The formation of Regional Transmission Organizations (RTOs) is a common thread among many of the pending bills and is treated with varying degrees of success. The RTO provisions in H.R. 1828 and 2050 are most effective. The bills provide sufficient inducement and critical policy guidance—with the RTO comprising a broad geographic region, having true independence, and full responsibility for the operation of the grid.

CFC is particularly pleased that Representatives Largent and Markey have drafted Section 108 of H.R. 2050 to provide the RTO with responsibility for planning and expanding the transmission system.

CFC commends Representative Stearns for recognizing the need to encourage RTOs.

*CFC encourages the Subcommittee to adopt the RTO provisions of H.R. 2050.*

#### *Market Concentration*

Formation of RTOs will mitigate *vertical* market power—where dominance in one market is leveraged to provide unfair advantages in a competitive market. However, while RTOs can to some extent reduce horizontal market power, more is needed to address generation markets that are so highly concentrated that competitive forces either don't exist or are insufficiently robust.

In the electric generation market, market boundaries are determined largely by transmission constraints—physical limitations on transfer capabilities. Within these boundaries, it is common for an incumbent utility to own more than 40 percent of the generating capacity—a concentration level at which economists assume an ability of a dominant firm to set and control prices above what would occur in a truly competitive market.

It is not simply total installed generation capacity that is important. Because of the physics inherent in electric system operations, some generation assets hold disproportionate strategic value—their operation may increase the carrying capacity of a vital transmission link, may be necessary for system reliability, provide peaking capacity that largely sets market prices, or provide “high-value” ancillary services. Ownership of these facilities provides opportunities for anti-competitive behavior in a sub-market of the industry. Thus, while a generating company may possess a small percentage of total generation in a given geographic market, it may dominate a particular product sub-market within the region.

Despite a significant increase over the past few years in the construction of non-utility generation, such facilities still represent a comparatively small fraction of total generation. Moreover, potential developers of such facilities often face a diverse set of entry barriers. Frequently, incumbent utilities own the prime sites for future plant location (often adjacent to existing plants). In addition, in many states, only utilities themselves can request and receive the necessary regulatory permits. Even if new, independent plants can be built, it will be years—and there will need to be

considerable growth in demand—before competitive suppliers will break the lock of the dominant player and markets will begin to operate competitively.

*Legislative Review:* Only H.R. 1828 and H.R. 2050 include provisions intended to address market concentration.

Section 503 of H.R. 1828, the Administration's bill, properly defines the problem and provides necessary tools to address market power. Specifically, the provision directs the Federal Energy Regulatory Commission (FERC) to require utilities that possess market power to submit market power mitigation plans and allows FERC to modify those plans if needed to eliminate market power. A number of market power mitigation tools are outlined and FERC is expressly authorized to require asset divestiture. The Administration's market power provision is partially flawed, however, by the establishment of a bifurcated system in which FERC can only act in "retail markets" at the request of a state commission who confesses a lack of authority to remedy market power abuse. CFC believes that the division between wholesale and retail markets—and exercise of market power within them—becomes murky in a restructured industry which is inherently multi-state in nature. Consequently, this provision could cause confusion and "gaps."

CFC commends Representatives Largent and Markey for recognizing the need to address market power issue in restructuring legislation. However, we would like to see Section 104 of H.R. 2050 strengthened and modified. First, the provision is too narrow: it applies only to the exercise of market power by parties that own generation and transmission or distribution. As outlined above, market power can be exerted by generation-only companies. Second, the provision triggers only upon a FERC determination that market power has been exercised. Most importantly, we believe it is important that the existence of market power is addressed up-front before abuses occur. The exercise of market power can be quite subtle and subject to multiple "explanations." The trigger mechanism in H.R. 2050 renders the provision cumbersome and potentially ineffective. Third, the provision provides insufficient remedies, relying on a reimposition of cost-based rates at wholesale and retail. Inefficient cost-based pricing is what restructuring legislation is intended to correct. It would be unfortunate to re-impose cost-based rates in those highly concentrated markets in which real competition is most needed. Moreover, cost-based rates might be a financial reward—rather than the behavior-correcting "punishment" intended by the authors. Finally, cost-based rate regulation—particularly by FERC in retail markets—may prove an impossible task once markets are deregulated by state action.

*CFC urges the Subcommittee to adopt the market power provisions of the DeLay-Markey bill of last Congress. In the alternative, Section 104 of H.R. 2050 should be revised to correct the limitations outlined above.*

#### *Mergers*

As you know, utilities are merging at an unprecedented rate. Since the mid-1990's, 24 utility mergers have been completed, and 12 additional mergers are pending at FERC. While mergers can bring efficiencies of size and scope, improved efficiencies and reduced rates are frequently *not* the result. According to a recent report by Anderson Consulting, less than half of the energy utility mergers over a 10 year period were profitable for shareholders. More troubling for the future of the competitive market, these mergers are often a mechanism for further consolidation of resources that increases market concentration and creates anti-competitive abuses.

Incumbent utilities are also able to leverage their regulated operations to advantage their unregulated affiliates. Proprietary information on customer load patterns and energy needs can be transferred exclusively to affiliate power suppliers. Similarly, utilities can refer customers to their affiliates for installation and maintenance of HVAC equipment and other demand-side measures. Finally, utilities can cross-subsidize their unregulated affiliates through the market value of using the utility's name, logo or personnel, or by misallocating overhead expenses from the affiliate to the regulated utility.

CFC believes that FERC's merger authority should be revised in several ways. First, the FERC standard for reviewing mergers should be expressly expanded to make competitive impacts the primary "screen." If a merger advances competition—either on its own or through FERC-imposed conditions—it should be approved; if it potentially frustrates competition, it should be rejected. Second, certain types of utility mergers and acquisitions—"convergence" mergers between electric and gas utilities, merger of generation-only companies and mergers between utility holding companies—can be structured to escape FERC review. These regulatory gaps should be closed. Third, mergers should be scrutinized to ensure that they will produce continuing net consumer benefits, not simply advance company empires and egos.

*Legislative Review:* The Administration's bill, H.R. 1828, comes closest to addressing CFC's objectives with respect to utility mergers. Under Section 110, FERC authority is clarified to address both mergers between holding companies and disposition of generation assets. CFC also commends the Administration for adding a "competitive screen" to FERC's merger review.

CFC commends Representatives Largent and Markey for addressing mergers between holding companies. We encourage expansion of Section 110 to address the other issues outlined above.

Section 7 of H.R. 667 would eliminate FERC review of utility mergers and disposition of assets. CFC believes that FERC merger review should be maintained and refined as outlined above. While Department of Justice and Federal Trade Commission merger review is important, the regulated history of electric utilities and FERC's resulting expertise justify continued FERC merger review.

*CFC encourages the Subcommittee to adopt the merger provisions of H.R. 1828 and also provide for FERC review of electric and gas "convergence" mergers.*

#### *Utility Affiliate Transactions*

The former monopoly status of utilities (and continued monopoly operation of distribution systems) provides anti-competitive opportunities in the ways that utilities and their unregulated affiliates interact. Utilities can:

- provide affiliates with preferential and discriminatory access to important information on power and non-power sales opportunities;
- purchase goods or services from affiliates at above-market rates;
- provide affiliates with goods or services at below-market rates;
- perform various administrative services for the affiliate that are charged to the parent company or regulated utility; and
- provide the affiliate, at no cost, with the considerable market value associated with the company name and logo.

Such actions harm consumers by having captive distribution system ratepayers cross-subsidize the utilities unregulated affiliate venture. Such actions also harm competitors by providing utility affiliates with an unearned and anti-competitive advantage.

*Legislative Review:* H.R. 667, H.R. 1587, H.R. 2050, H.R. 1828 and H.R. 2363 establish standards for affiliate transactions and FERC and state commission access to books and records. CFC believes the scope of and standards for affiliate transactions should be expanded and that a workable enforcement provision be included in order to address fully and effectively the problem of abusive affiliate transactions.

*CFC urges the Subcommittee to adopt measures that parallel the affiliate transactions provisions contained in the 1996 Telecommunications Act.*

#### *Reliability*

As long as parties with a commercial commodity interest retain exclusive control of system reliability, opportunities will exist to manipulate legitimate reliability objectives for commercial advantage.

Establishment of a self regulating reliability organization subject to FERC oversight, with authority to establish mandatory reliability requirements (and the security coordinators that do the implementation) will both promote a reliable electric system and competitively neutral reliability standards. The members of CFC support the consensus proposal developed by the North American Electric Reliability Council (NERC) and urge its adoption.

*Legislative Review:* CFC commends the Administration and Representatives Largent and Markey for adopting the consensus reliability language in their bills. CFC also commends Representative Stearns for recognizing the importance of reliability issues by including meaningful provisions in his bill.

*CFC urges the Subcommittee to adopt the reliability provisions contained in H.R. 2050 or H.R. 1828.*

#### *Stand-Alone PUHCA Repeal*

PUHCA was enacted as a companion to the Federal Power Act. PUHCA establishes passive restraints on the structure of the electric utility industry in order to mitigate the formation and exercise of market power, preclude practices abusive to captive consumers and competitors, and facilitate effective regulation.

Rather than ushering in competition as repeal proponents would have you believe, stand-alone repeal will have substantial anti-competitive repercussions and retard the development of a vibrantly competitive market.

The members of CFC recognize that the current administration of PUHCA has clear limitations. However, its underlying purposes—the mitigation of market power and prevention of anti-competitive and anti-consumer utility diversifications—re-

main relevant today. CFC believes that PUHCA could and should only be repealed as part of a broad electric restructuring bill that contains the market power provisions outlined above.

*Legislative Review:* CFC does not support adoption of H.R. 2363 on a stand-alone basis. In addition, we believe that PUHCA repeal should be delayed to provide adequate opportunity for replacement market power provisions and retail competition to take hold. For that reason, CFC prefers the conditional repeal provided in H.R. 2050 and prefers the 18 month effective date contained in H.R. 667, H.R. 1828, H.R. 2050 and H.R. 2363.

#### *Conclusion*

Effective, sustainable competition will not automatically emerge in the absence of regulation. Regulation can—and should—be relaxed for those markets and products that are subject to effective competition. However, given the historical operation and structure of the electric utility industry, competition in all sectors and regions will not occur simply by legislative declaration.

To promote the transition to competitive electric markets, steps must be taken to remove the vestiges of the former regulatory system and its accumulated opportunities to exercise market power. Once done, the transition to competition can occur and the need for active regulation will subside.

Mr. BARTON. Thank you, Mr. Kanner. I am not used to people finishing early. I was in the middle of collecting my thoughts. The Chair is going to recognize himself for the first 5 minutes of questions. I want to go to Mr. Crisson. I assume that you are the CEO of a City-owned municipal utility. You said Tacoma, Washington. Is that correct?

Mr. CRISSON. Yes, sir.

Mr. BARTON. Do not answer anything that is proprietary. I am not trying to get too nosy. In Tacoma, does the electricity company, on a net basis, generate funds that go to the general treasury of the City?

Mr. CRISSON. Subject to our City Charter and State law, we are assessed a 6 percent gross earnings tax on the revenues of our utility and that does go to the general fund of our City.

Mr. BARTON. So, you are assessed a tax, but if you have a good year and sell lots of electric, and generate more revenue than you can spend on maintenance and any improvements, the balance does not go to the City; it stays in some sort of a reserve fund?

Mr. CRISSON. That is correct. We have very specific State and City ordinances to that effect.

Mr. BARTON. For large municipals, I understand the city of Los Angeles has their own utility and the city of San Antonio. Those are two that I know of. Do they have a natural competitive advantage, vis-a-vis an investor-owned utility, or perhaps something like Bonneville, or the TVA? In today's marketplace, is there a reason to expand municipally owned utilities?

Mr. CRISSON. I think there is a reason to expand publicly owned utilities today as much as there ever was. I have a bit of a bias in that regard.

Mr. BARTON. You should.

Mr. CRISSON. I think it is important to recognize that historically public power has been the sole competitive yard stick, and the one option that people did have in the absence of wholesale and retail choice.

Mr. BARTON. I am absolutely for municipal power when the utility generating industry started. My question is prospectively, I mean, I listened to your testimony very carefully. Your group has signed off on one of the bills that grandfathers existing financing.

If I understood you correctly, you agreed not to issue additional bonds in the future for new capacity that is not tax exempt. Is that not correct?

Mr. CRISSON. Well, that would be a feature of the bill in which an election is offered. That would be one of the choices a system could make; yes, sir.

Mr. BARTON. So, what I am trying to just work through, if we are going to enact a comprehensive restructuring bill, if you are going toward a competitive market, and that is the goal, is there still a need to have some sort of a guarantee, I do not want to be too punitive, a protected area for municipals? That is all.

Mr. CRISSON. No. I do not think there is a need for a protected area, Mr. Chairman, and I do not think that is what we are seeking.

Mr. BARTON. No. That is not what you said. I am asking more of a theoretical question.

Mr. CRISSON. No. I do not think there is a need for any protection for public systems in that regard. I think it is important to preserve, as I think I sense from many members of the committee, the principle of local choice and State control. That is all we are asking.

What this particular request is all about is to make sure that as we make that transition, our customers are not punished or disadvantaged simply because they happened to be served by a publicly owned utility.

Mr. BARTON. I understand that. I think your position is a very defensible position. Mr. Brooks, you are the PUHCA Repeal Now spokesman, I think. Is that correct?

Mr. BROOKS. Yes, sir.

Mr. BARTON. What is your group's position on a Federal provision on PUHCA repeal that never repeals PUHCA, merely sets up conditions that exempt companies that are subject to it from it, so that the statute remains on the books, but there are conditions under which you are exempted from it. Is your group for that or against that type of a concept?

Mr. BROOKS. We are actually against that because we think the act itself should be repealed. You can come in and out of exemption, and even exempt companies are threatened by some of the aspects of it; foreign investment as an example.

Mr. BARTON. Okay. Your group has signed off on the Tauzin bill which is a 12-month repeal. There is another bill that is an 18-month repeal. What is magic about 12 months versus 18 months, as opposed to immediate repeal?

Mr. BROOKS. When we say repeal now, we assume there would be a period of time from the time you enact it until it is effective. Of course, the sooner the better for us. We will not quibble over 6 months.

Mr. BARTON. Is there a business defensible technical reason that the transition period needs to be 18 months, or 24 months, or 12 months? I know there has got to be a certain time period. I am just interested in the difference between 12 months and 18 months; if there is some actually fact-based reason to have a different time period.

Mr. BROOKS. No, sir. For us, the sooner the better. Others would just like longer to make the process.

Mr. BARTON. So, those who support a longer time period are doing it primarily to give political considerations time to come into being.

Mr. BROOKS. I think that is correct.

Mr. BARTON. Okay. My time is expired. I will have other questions perhaps after everybody has been given their opportunity. Mr. Hall is recognized for 5 minutes.

Mr. HALL. Thank you, Mr. Chairman.

Ms. Zannes, as the domestic oil and gas industry, which I have a great interest, since I have an oil patch in my district, and Mr. Kanner knows that. We have been concerned about our vulnerability from a national security standpoint; too much reliance on foreign oil. That has been ongoing. We have tried to do some things about it with import fees and things like that.

We went up against mistreating people in the Northeast that have to have heating oil and all of that. It has just been almost an impossible thing to do. We have gone at it from every direction and we still have not done it. We have talked about the danger of us being vulnerable from a national security standpoint because of this reliance and the enormous disruptions that might occur if imports were substantially disrupted.

I am going to give you one that I think you can knock right out of the park here. Would you say that increased reliance on renewables, I think our trash power, as you call it, could bring about a similar energy security problem for the Nation?

Ms. ZANNES. I do not believe, sir, that we will develop renewables to the point that we would be so dependent on renewables that it would cause a security concern. In fact, it is the opposite. I would propose that an increase from 2 percent to 4 percent, which would be a doubling of renewables, would be a very small fraction of our energy generation. It could only go further to support and to help with national diversity and help with our security. How was that?

Mr. HALL. That was good. They do not really compare in size or enormity, but it is a similar trend that you could fear, I think.

Ms. ZANNES. Yes, sir.

Mr. HALL. Mr. Parker, would you like to tie into that one? I thought you blinked there or nodded or something. No. You just got your arms folded. You have been supportive of the renewable portfolio standard. If a standard is not adopted how well would tax credits work for your industry? Any of you working on those?

Ms. ZANNES. Well, Mr. Hall, I view perhaps a little differently than some of the renewable sources of power and interests. I view an RPS, or a tax credit, or a payment, all of that at the end of the day as similar; as producing the same result, which is an encouragement of renewables. So, my industry is more flexible perhaps in its position on encouragement of renewables.

If you look at the RPS provisions of either the administration's bill or Mr. Largent's bill, you would see that there is a cap. In such, even an aggressive RPS, if our power is more than a penny and a half against all other power, the purchaser will go after getting credits versus buying power from us.

So, the upshot, the bottom line to it is that even under an RPS, there is in some way just an encouragement of renewables up to 1.5 cents per kilowatt hour. The reason I think that our industry has supported an RPS more than tax credits or payments is that we believe that an RPS would be harder to take away.

Large power investments are over the long-term. So, you want security; to the extent that you are saying you are going to get more for your power. To the extent you have an authorization, and every year you have to go back for an appropriation, there is less security in the price you are going to get for your power. Therefore, more reluctance in making the investment.

Mr. HALL. Let me ask you about the burning of municipal solid waste, which sounds like a pretty sensible way to me to solve more than one problem. It eliminates a growing problem and you get something for it. It is a win-win deal. Why have not the waste energy plants become more common place throughout our country?

Ms. ZANNES. We have 103. We burn 15 percent of the country's trash. I must say that people do not say we need a new energy source. Let us gather up the trash and burn it. The facilities are built primarily as disposal options. Most recently especially, there has been a lower cost option with landfills. So, cities have turned to that. But, we are still growing.

Mr. HALL. When you are trying to build, then own, and operation these things, what barriers do you hit? Who pushes you back? If we want to build a lake, the environmentalists hold you up for years and years.

Ms. ZANNES. To some extent, certainly the environmental concerns of anything with a smokestack becomes problematic. I do believe that, from a business standpoint, to the extent you have security and price, and security and fuel, those are the things that are of most concern. Quite frankly, having this uncertainty in the power market right now does not help. So, we look forward to the Congress acting and moving forward.

Mr. HALL. I thank you.

Ms. ZANNES. Thank you.

Mr. HALL. I yield back my time, Mr. Chairman.

Mr. BARTON. Thank you. We will recognize Mr. Burr for 5 minutes.

Mr. BURR. Thank you, Mr. Chairman. Let me thank Mr. Brooks, because if he had not mentioned me, I would have been aced out. I did not get mentioned by anybody else. So, I want to take this opportunity because I think that the exclusion or inclusion of something in these pieces of legislation I do not think is indicative of the total thoughts of any one individual or the reflection of the entire group.

I would say to Mr. Parkel that we are all interested in making sure that we especially learn from some of the telecommunications things and those things that we feel might have a Federal need are in fact addressed. I hope that in the end, we can all look at the bill and say, you know, this is good.

I think we would make a mistake, and this is a personal observation, that we would make a mistake to try to identify what those are prior to understanding where it is we are going. I think that



is some of the reasoning that went into some of the bills and the exclusion of that component.

Until we can find the consensus on where it is we are trying to get to and what that world will look like, it is difficult to determine how many things we need to address or what is appropriate and what is not; what might be our responsibility; what might be the State's responsibility. I would say that to some degree, Mr. Crisson, the same is true about the needs of public power.

Clearly, it is an issue that goes through Ways and Means. One of the decisions that we have to make is do we want a bill that limits itself on deregulation to the concerns within the Commerce Committee, or do we feel confident in the expertise on deregulation of the members of the Ways and Means Committee who would then have the jurisdictional power, based upon that referral, to change the renewable portfolio or the consumer protection portions?

There is some discomfort with that. I am happy to tell you that there is a willingness on the part of Ways and Means as we move for them to move. So, it can be done separately. If I were you, I would be calling for it to be all one package as well. So, please understand that we are empathetic of where you are.

Ms. Zannes, you ended with the uncertainty in the power market.

Ms. ZANNES. Yes, sir.

Mr. BURR. Tell me, if you will, what you mean by the uncertainty of the power market.

Ms. ZANNES. I come from a very limited view of being a PURPA contractor. Right now, primarily all of my contracts are PURPA contracts. As such, it is difficult to sit down and negotiate those types of contracts, given the uncertainty. You would think there would be a rush, quick, let us get them done. That does not seem to be the case. Whenever, both on a State basis, there are 23 States so far that have enacted some type of restructuring legislation. As I understand it, there are many more looking at it.

Mr. BURR. I think 27 is the correct number.

Ms. ZANNES. I only looked last week.

Mr. BURR. It is 23 that have done it and 27 that are looking at it, but that does add to 50; does it not.

Ms. ZANNES. I thought 27, as of last week, actually passed. I thought you were up on that. As such, if you are negotiating, you can imagine two business people, it leaves the more uncertainty as you sit down on both sides. Business does not like to negotiate in the uncertainty, and the risk of what may change, and whether you will get a better deal if you would just wait.

Mr. BURR. Is there anybody on this panel that believes that Congress will do nothing?

Ms. ZANNES. I am sorry?

Mr. BURR. Is there anybody on the panel that thinks Congress will do nothing as it relates to deregulation?

[No response.]

Mr. BURR. For the record, let me state that everybody agrees, Congress is going to do something. Mr. Brooks.

Mr. BROOKS. Mr. Burr, there is a good chance Congress may do nothing on the restructuring bill. I am speaking from experience. We have been working on this for a long time, which happens to

be the reason why we would like to have a stand-alone PUHCA bill because we question whether we will get a deregulation bill.

Mr. BARTON. We give you one point for getting that extra plug in there.

Mr. BURR. So, given that most believe that Congress is serious about doing something, is it not reasonable to believe that, that uncertainty is going to exist and it is not just going to exist in the PURPA contracts? It is going to exist everywhere. Mr. Crisson, I take for granted you are in generation.

If you were on the verge of needing additional power, you might be uncertain about whether to build your own generation or to buy until this thing gets straightened out so that you knew what the lay of the land looked like. Pretty accurate?

Mr. CRISSON. Yes, sir. That is a fair statement.

Mr. BURR. I think the last litmus test that this committee, and hopefully this Congress, should go to is how does Wall Street respond to what we have done? With the exception of possibly Mr. Crisson, the rest of the world has to go to Wall Street for capital.

It attracts it through shareholders or through loans. I think that one of the important things is Wall Street's assessment of what we have done. Does it make it predictable or does that uncertainty still exist? I think ultimately that is a question that every member, and hopefully the panelists, will look at, as well as those on Wall Street to determine what type of certainty did we bring to it.

Did we bring the same certainty to the future for generation decisions that I am sure Mr. Parkel would like as it relates to the consumer protections? Certainly, we are not there yet. Until we can wrap this up, which will require work on both sides of the aisle, that uncertainty will exist and is certainly not healthy for the expansion of your business or any of the entities in the power business that are here. I certainly thank you for your expertise and your willingness to come. Mr. Chairman, I would yield back the balance of my time.

Mr. BARTON. Thank you, Congressman Burr.

There were some other people on the first panel that mentioned the Burr bill. You got some votes this morning.

Mr. BURR. I did not come for votes. I came for knowledge. Most of it I have gotten from Mr. Markey and I am eternally thankful for that.

Mr. BARTON. The vote winner of today's hearings, including the administration's bill is now with us, the Markey-Largent bill has gotten more positives on everybody's scorecard, except the Stearns scorecard who showed about 40 votes for Stearns for some reason. So, are going to recognize Mr. Markey for 5 minutes for questions.

Mr. MARKEY. I thank you, Mr. Chairman, very much.

I apologize for not being here for the first panel. This is like my 40th, 50th electricity restructuring hearing. I am suffering from, my doctor says it is electricity restructuring fatigue syndrome. So, I am just kind of worn out. So, I thought I would give myself a break on the first panel.

The beauty of that Stearns provision, by the way, is that it is inside of Largent-Markey. That is the great part about it. We actually have it in. He has just broken off kind of a tasty little tid-bit, but it is inside that larger smorgasbord that we have put together.

So, here is what I would like to do, if I could. This is self-indulgent. Mr. Burr would appreciate this about me. What I would like to do is to go down the panel, if I could, and just get some sense of how they feel about Largent-Markey. So, Maria, who I know, do you support the PURPA language?

Ms. ZANNES. Yes, we do.

Mr. MARKEY. Do you support the contract sanctity provisions?

Ms. ZANNES. We do.

Mr. MARKEY. You do. All right. Let me keep moving then. Mr. Crisson, do you support the private use tax provision language of the bill?

Mr. CRISSON. Yes, we do.

Mr. MARKEY. Mr. Parkel, do you support our aggregation consumer disclosure language and the privacy language?

Mr. CRISSON. Yes, sir.

Mr. MARKEY. You do. Do you want us to do more on universal service?

Mr. CRISSON. We would like to and we gave some recommended thoughts on that on our documentation to see if there was a way to get a little more definition and recognition for universal service; yes, sir.

Mr. MARKEY. What would you suggest?

Mr. CRISSON. What we suggested is that because there is a great deal of pressure on the States in the financial areas that we think that the under-served, disadvantaged people will have some funding problems and suffer through this. We recommended that there may be a tax put on the providers. That there could be a joint Federal and State group to help give out these funds to prevent any problems, really, for the disadvantaged consumers.

Mr. MARKEY. Excellent. Mr. Kanner, do you support the regional transmission provisions?

Mr. KANNER. Absolutely, Congressman.

Mr. MARKEY. And the reliability provisions?

Mr. KANNER. Yes, we do.

Mr. MARKEY. And you would like the market power language strengthened?

Mr. KANNER. Correct.

Mr. MARKEY. Because?

Mr. KANNER. Because in our view, Congressman, the provision needs to be strengthened to ensure that the generation side of the business is adequately competitive. There are a few ways, both in the trigger and the scope of authority that need to be adjusted to make sure we have competitive markets.

If I could take 1 minute, Congressman, to respond to Mr. Burr's earlier observation. I would note that Wall Street in fact likes to have robust liquid markets. That is what we are trying to get on the generation side. They have also found that utilities that have divested generation have gotten a premium above book, and that the resulting distribution company, in fact, is a better investment opportunity; so, just a few observations I wanted to share with you.

Mr. MARKEY. Thank you. Mr. Brooks, you strongly support the PUHCA provisions in Largent-Markey. I am sorry, you oppose. You oppose the PUHCA provisions of Largent-Markey and you support

a free-standing PUHCA repeal with no requirement for retail competition. Is that right?

Mr. BROOKS. Yes, sir, that is right.

Mr. MARKEY. Is there anyone here who is willing to take up this issue with Mr. Brooks as to why, in your opinion, he is wrong in terms of opening up having a requirement that there be open retail competition? Do any of you wish to volunteer? Yes, Mr. Kanner.

Mr. KANNER. Congressman, I can opine a little bit on that. PUHCA was established in tandem with the Federal Power Act to protect consumers, competition, and afford effective regulation. The choices are really competitive markets or regulated markets.

I think the provision in Largent-Markey recognizes that if you remove the regulation but do not in fact require the competition, that you may not end up with the desired end state. And I think that the genesis of your provision has a lot of merit to it.

Mr. MARKEY. That is correctly stated. Mr. Brooks, what would you say to me, sir?

Mr. BROOKS. Congressman Markey, back to the market power issue, as I have stated earlier in my presentation, we think that the act, itself, stimulates market power. If we eliminate PUHCA, then we open up the opportunity to eliminate market power.

We are against tying elimination of PUHCA, as we see it today, tying that to retail access because it would be not only unwieldy, but unfair to a holding company like ours, as an example, who is serving in a State, which does not have open competition.

We would have to open up our system to choice and our neighbors could come take our customers and we could not take theirs. So, we think that is the unfairness of it. We do think that the market power issue is addressed adequately.

Mr. MARKEY. Ms. Zannes, can you comment on this issue?

Ms. ZANNES. I do not have a comment.

Mr. MARKEY. You do not have a comment. Mr. Crisson or Mr. Parkel?

Mr. CRISSON. Mr. Markey, I think that Mr. Kanner's view largely reflect the views of public power, frankly as a whole. Mr. Richardson's testimony in the first panel addresses this issue. We are somewhat sympathetic in the sense that we are pursuing legislation that will likely require the cooperation and input of another committee with jurisdiction. We think properly that any PUHCA repeal, as a part of any comprehensive legislation, that might go forward on electric restructuring.

Mr. MARKEY. With all due respect, Mr. Brooks, I do disagree with your perception of what would happen if we repealed PUHCA and did not have some corresponding guarantee that the marketplace was open. My fear would be that you would be able to hold onto your monopoly, and yet be free from some of the responsibilities that are attendant to being in fact a monopoly.

I think that is what we are trying ultimately to unravel here; that is the need to have the government in. That is the whole point of all of the laws we passed in the 1990's out of this committee. I just have to disagree with you on that.

Mr. BROOKS. Congressman, one other word. I understand that. First off, we think FERC has more than enough authority to control market power. Second, I would reiterate again the best way to

not have market power is to have opportunity for all players to come in and provide generation in areas where we perceive there is market power.

If we are a holding company, and we can only buy the utilities next door, we cannot participate several States away, nor can a market power dominated area expect participation from utilities in States further located away. So, we think the market power issue is really looked at in reverse on this issue. Eliminating PUHCA would help eliminate market power.

Mr. MARKEY. We did create in the 1992 act—

Mr. BARTON. The gentleman's time has expired, I would say about 5 or 7 minutes ago. You got more votes than anybody else today. As the winner, we are giving you extended time.

Mr. MARKEY. I thank you, Mr. Chairman. You are very nice.

Mr. BURR. Mr. Chairman, could I make a public recommendation to the Chair that in following up on what Mr. Kanner said, that we try our best to have a Wall Street hearing at some point where we can actually bring people in and probe through this whole thing with Wall Street? I also would like to make it clear for the record that if our panelists ran for Congress, Mr. Markey would get four votes for his bill today and one against.

Mr. BARTON. Well, fortunately, none of these folks are considering running for Congress or we would all be in trouble. On your suggestion for a Wall Street hearing, my understanding is that is something that is under active consideration right now. That we actually have a memo to that effect that is in one of my many inboxes to take a look at. We are not going to have another final round. I had one more question.

Mr. Burr, did you have another question?

Mr. BURR. No.

Mr. BARTON. Mr. Markey?

Mr. MARKEY. No.

Mr. BARTON. My question is to the AARP representative on aggregation. One of your representatives was at a working group meeting several days ago and I posed this question. I would like AARP to give some thought.

Should aggregation be allowed by a national organization like AARP, or perhaps a company like McDonald's, or Walmart, in a closed State? In other words, is your support for aggregation only in those States that are already open? Have you thought about that or your organization?

Mr. PARKEL. We have thought about it. We have taken really no position on an AARP aggregation plan. We believe also that the States it would only really work in are the open States, the competitive States.

Mr. BARTON. Well, there is no technical reason if we statutorily allowed it that an association like AARP could have it everywhere, because it would seem to be somewhat unfair to let an AARP member in an open State, like Texas, participate but in a closed State, like Florida, not participate.

Mr. PARKEL. I agree with that. I just do not know how it would work at this point in time. I think that is something we would have to think about how to do it.

Mr. BARTON. Okay. I want to thank this panel for your patience. You were here at 11 a.m. and had to wait through a number of votes. We do not currently have any other hearings scheduled on electricity restructuring. We want to wait and see if we can put together a comprehensive bill. Hopefully we can, and we will have a legislative hearing or hearings on that bill.

This hearing on the bills that are currently before the Congress is adjourned.

[Whereupon, at 3:45 p.m., the hearing adjourned.]

[Additional material submitted for the record follows:]

FOOD MARKETING INSTITUTE  
WASHINGTON, DC, 20006-2701  
July 22, 1999

The Honorable JOE BARTON  
U.S. House of Representatives  
2264 Rayburn House Office Building  
Washington, DC 20515

DEAR CHAIRMAN BARTON: The Food Marketing Institute would like to submit this letter for the Record for the Energy and Power Subcommittee hearing on July 22, 1999. FMI is pleased that the Energy and Power Subcommittee is holding this hearing to examine all the legislative proposals on electricity restructuring.

The Food Marketing Institute (FMI) is a nonprofit association conducting programs in research, education, industry relations and public affairs on behalf of its 1,500 members including their subsidiaries—food retailers and wholesalers and their customers in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of \$225 billion—more than half of all grocery store sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms and independent supermarkets. Its international membership includes 200 members from 60 countries.

Electricity is the second highest operating cost for FMI members, second only to the cost of labor. Electricity is the only commodity used by our members which cannot be purchased competitively in all states.

FMI is, and has been for a number of years, a strong advocate for federal legislation to create a competitive national electricity market, which legislation should include a *date certain* to guarantee all consumers in *all* states have the right to choose their electricity supplier. A *date certain* is the only way to guarantee that all classes of customers—commercial, residential, and industrial—in all states, benefit from competition in the electric industry. States will have the crucial responsibility for the details of breaking up the state chartered franchises.

For FMI members who operate in several states or in monopoly states, a *date certain* is crucial in order to be able to aggregate power purchases with interstate contracts. Under the current system, large industrial users have the ability to go off the system and cogenerate their own power. They also can negotiate "cogeneration deferral rates" (a special discounted rate that the large users can get in order for the utility to retain their load and prevent the large user from going off the system). In other words, large users have options and can negotiate discounts in states that have *not* adopted retail competition. Residential customers and most commercial businesses have *no* options in states that have not adopted some form of retail access.

Opponents of competition have labeled a *date certain* as a federal mandate and an infringement on states rights. But in reality competition is not a question of state versus federal rights, it is a question of the public's rights—the right of every citizen to choose a supplier of electricity and not be beholden to a monopoly. At a minimum, it is imperative that federal legislation contain a strong aggregation provision which will allow customers operating in any state to aggregate their power purchases in order to take advantage of their total purchasing volume. A state that has not adopted retail competition should not infringe on the right of a customer to have an interstate contract for providing power.

Therefore, federal legislation should in no way restrict any seller of electricity from aggregating customers and, at the same time, should guarantee that any purchaser, wherever located, should have the right to join or affiliate with any other purchaser to buy in an aggregated manner. Without the ability to aggregate, small customers, including many commercial businesses, will be hard pressed to reap the

full benefits of competition. In addition, restrictions on aggregation would prevent businesses from allowing employees to purchase electricity through the same aggregator used by his or her employer.

Thank you for allowing us to submit this letter in Record. I look forward to working with you on all the issues surrounding electricity restructuring. If you need any additional information, please feel free to contact me at (202) 429-8262.

Sincerely,

JOHN J. MOTLEY III,

*Senior Vice President, Government and Public Affairs*

cc: House Commerce Committee Members